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## **TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1938**

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**No. 22**

**THE UNITED STATES OF AMERICA, PETITIONER**

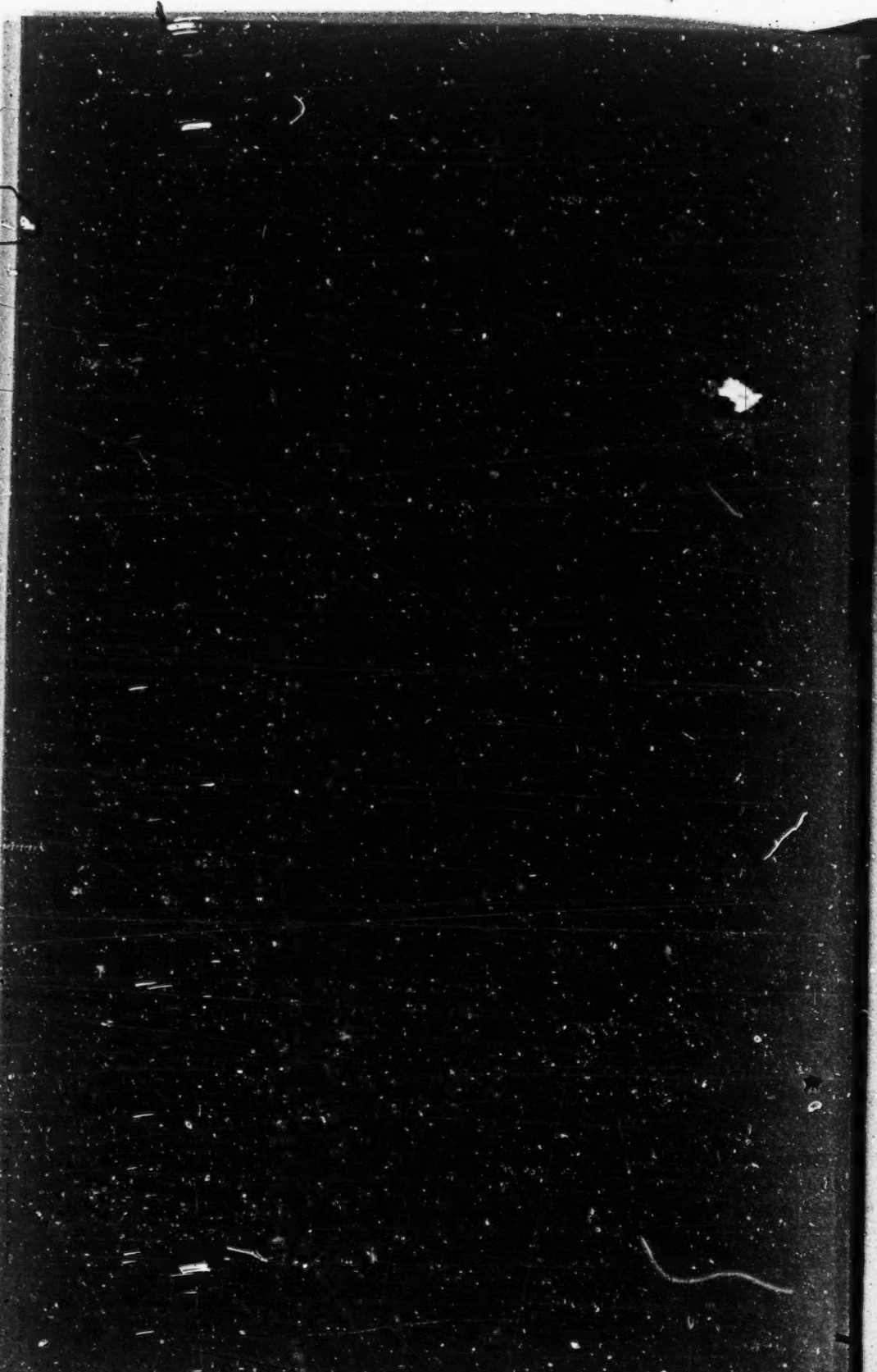
**VS.**

**CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
TRUSTEE UNDER THE LAST WILL AND TESTAMENT  
OF JAMES DUGGAN, DECEASED, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED APRIL 5, 1938  
CERTIORARI GRANTED MAY 16, 1938**





# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 22

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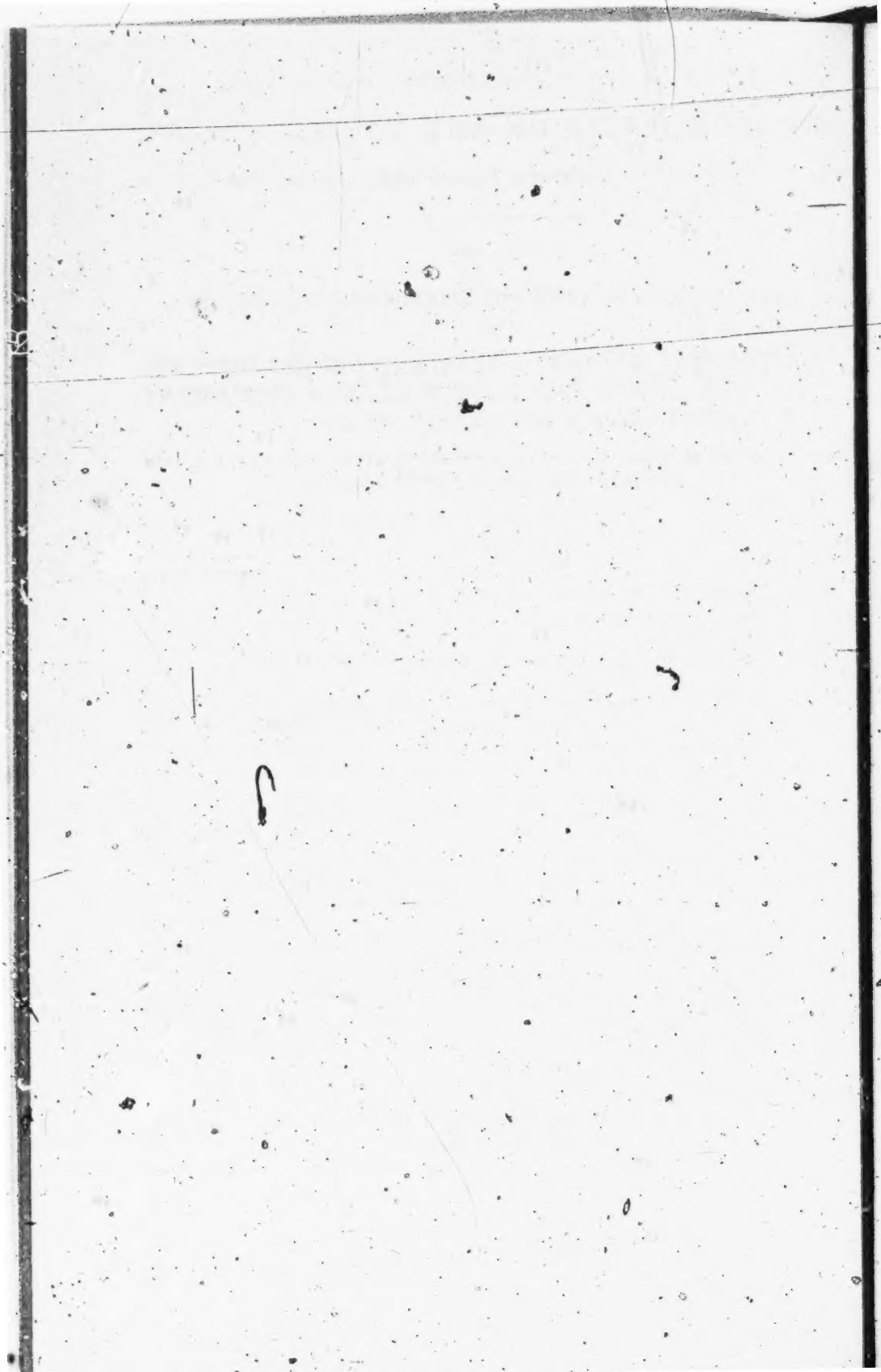
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[Placita omitted.]

In United States District Court, Northern District of Illinois,  
Eastern Division

No. 11769

UNITED STATES OF AMERICA

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, TRUSTEES UNDER  
LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

*Bill of complaint*

Filed May 6, 1932

to the Honorable Judge of the District Court of the United States  
for the Northern District of Illinois:

The plaintiff by its attorney, George E. Q. Johnson, United States  
attorney for the Northern District of Illinois, complains of the  
above-named defendants and respectfully shows to the court:

## I

That at all times hereinafter mentioned the plaintiff was and now  
a corporation sovereign and body politic.

## II

That the defendant Continental National Bank and Trust Company  
a corporation organized and existing under the laws of the State  
of Illinois, with its principal office in Chicago, Illinois; and as such  
is engaged in the banking and allied activities, and particularly  
acting as fiduciary to varied interests, being thereto authorized  
by its charter provisions. That under the last will and testa-  
ment of the late James Duggan of the County of Dade, in the State  
of Florida, said defendant is appointed and designated trustee under  
items (3) and (6) of said will for the purposes and with the powers  
herein set out.

## III

That the defendant Henry Duggan is a brother of the late James  
Duggan and a distributee of his estate, being the person mentioned  
Item (2) of said last will and testament, and as such distributee  
received the sum of \$50,000.00; that said Henry Duggan is further  
beneficiary of said estate under the terms of Item (7) in said will,  
as set upon the contingencies therein set out; that said Henry Duggan  
is a resident of the State of Illinois and City of Chicago, and lives  
within the jurisdiction of this Court.

## IV

That the defendant Timothy Duggan is a cestui que trust and beneficiary under the last will and testament of the said James Duggan, specifically mentioned and provided for in Item (4) of said will; that the defendants Ramona Duggan, Martha Duggan, and Eugene Duggan are the children of the said Timothy Duggan and contingent beneficiaries and cestui que trustent under Item (4) of said will; that the said Martha Duggan and Eugene Duggan are minors without legal or testamentary guardian; and that all of said defendants mentioned in this said section are residents of the State of Illinois, living within the jurisdiction of this Court.

## V

That the defendant Catholic Charities of the Archdiocese of Chicago is an eleemosynary corporation organized and existing under the laws of the State of Illinois, with its principal place of business and operation in the City of Chicago; and is a contingent beneficiary and cestui que trustent under Item (4) of the last will and testament of the said James Duggan.

## 4

## VI

That James Duggan, resident of County Dade and State of Florida, died in March 1929, leaving his last will and testament which was duly filed and admitted to probate, and recorded in the county judge's court in and for Dade County, State of Florida; and Michael Duggan, the executor therein named having died prior to the death of James Duggan, the Biscayne Trust Company, a corporation of Miami, Florida, was duly appointed and qualified as executor of said will; that thereafterward the said Biscayne Trust Company became financially involved and was placed in the hands of a receiver and was formally dismissed as executor of said estate, and Lee C. Robinson was appointed and qualified as administrator de bonis non cum testamento annexo of said estate, on the 15th day of September 1930. A copy of said will is hereto attached, marked Exhibit "A," and is asked to be considered for all intents and purposes part and portion of this bill of complaint.

## VII

That prior to his death, James Duggan was engaged in various enterprises, and during the years 1919 and 1920, was the chief owner and stockholder of Johnston City and Big Muddy Coal and Mining Company, an Illinois corporation, engaged in the business of mining and selling coal; that said Johnston City and Big Muddy Coal and Mining Company owned a subsidiary corporation known and designated as the Johnston City Coal Company, the said corporation being



organized under the laws of the State of Illinois and being affiliated with and owned by the said Johnston City and Big Muddy Coal and Mining Company; that for the calendar year 1920, the said Johnston City and Big Muddy Coal and Mining Company and the Johnston City Coal Company filed their consolidated income and profits tax returns on May 16, 1921, showing a tax due of \$5,269.21 which was paid; that subsequent and additional returns were filed by said corporations on February 11, 1922, showing additional taxes due, but none of said returns were correct and proper according to law; that while purporting to reflect the true condition of the business of said corporations and to give a correct and true statement of the gain, profits, and income from all sources received by or accrued to said corporations

5 during the calendar year 1920, the said returns were in fact inaccurate, incorrect, and false in that they did not disclose the true profits and income nor show the true tax liability as required by law, whereupon, it became necessary for the Commissioner of Internal Revenue to investigate the books and affairs of said corporations, said investigation extending over a period of considerable time; that as a result of said investigation a deficiency in tax was determined by the Commissioner of Internal Revenue to the amount of \$316,620.61, and a sixty-day letter was sent to the taxpayer on December 16, 1924 in conformity with the statute properly applicable thereto; that no appeal was taken to the United States Board of Tax Appeals, and on the January 1925 list, O'3 C, Sp. 3, the same was duly assessed according to the determination made by the Commissioner, and no part of the said tax has been paid.

### VIII

That during the years 1920 and 1921 the Johnston City and Big Muddy Coal and Mining Company was in a state of dissolution and as the result of the same, all of its assets were converted into cash and in commercial securities, under the direction of James Duggan, president and chief stockholder of said corporation, and the said James Duggan received and kept in his charge and possession assets of the corporation to the amount of \$295,331.64 and converted the same to his use and purposes without payment or rendering value therefor in return to the corporation, and without paying off and discharging the obligations of the said Johnston City and Big Muddy Coal and Mining Company due the Government of the United States for income and profits taxes as aforesaid. Plaintiff avers and alleges the said James Duggan received said assets impressed with a trust in favor of the United States for the payment of its tax account due by the Johnston City and Big Muddy Coal and Mining Company to the extent and value of the assets so received, which said trust has never been discharged or obviated. That having received said assets in the nature and form of funds and negotiable securities, the said James Duggan commingled and mixed the same with his own individual estate in such way that same could not be readily made sep-

arable or distinguishable, and in such way as to impress his own estate with the said trust to the extent and value of the assets so received from the Johnston City and Big Muddy Coal and Mining Company, as herein described and set out.

## IX

That the outstanding tax account of the said Johnston City and Big Muddy Coal and Mining Company remaining unpaid, and the corporation having been dissolved on December 29, 1921; without available assets in its possession for the payment of said tax account, and there being no assets or property whatsoever of said corporation against which distraint could be made, the Commission of Internal Revenue, on April 15, 1926; by registered letter notified James Duggan that under the provisions of Section 280 of the Revenue Act of 1926 there was proposed for assessment against him the sum of \$295,331.64, constituting his liability as transferee of the assets of the Johnston City and Big Muddy Coal and Mining Company of Chicago, Illinois, for an unpaid balance of \$316,488.71, representing income and profits taxes assessed against that corporation for the taxable year 1920. The details of the proposed assessment were set forth in an attached statement and mailed to said James Duggan, notifying him further that he was allowed sixty days from the date of the mailing of the letter within which to file a petition for the redetermination of the deficiency in tax. Thereafterward, upon receipt of said letter and pursuant to the notice sent, the said James Duggan filed a petition before the United States Board of Tax Appeals on June 11, 1926, wherein he protested the assessment of said tax, and upon answer filed by the Commissioner of Internal Revenue, the issue was joined for determination by the United States Board of Tax Appeals. After due consideration and after hearings and orderly proceedings, had before said Board of Tax Appeals, on January 27, 1931, an order of redetermination was made and decided by the United States Board of Tax Appeals, wherein the said James Duggan's liability as transferee in respect of income and excess profits taxes of said Johnston City and Big Muddy Coal and Mining Company for the calendar year 1920 was fixed at \$295,331.64 with interest thereon, as provided by law, from December 6, 1924. That six months thereafterward, in accordance with the provisions of law, no petition for review having been filed in the case, and no appeal having been taken therefrom, the said order of redetermination became final, and the obligation of said James Duggan to the plaintiff was duly established whereby he became liable for the payment of the outstanding tax account of the Johnston City and Big Muddy Coal and Mining Company in the said amount of \$295,331.64, as aforesaid, no part of which has been paid, and which is now due to the plaintiff United States of America, without offset credit or counterclaim. A copy of said order of redetermination by

The United States Board of Tax Appeals is hereto attached, marked Exhibit "B", and is asked to be considered as a part and portion of this section of the bill of complaint.

## X

That James Duggan died in March 1929 being domiciled in Dade County, State of Florida, as aforesaid, leaving an estate worth approximately the sum of \$1,500,000.00 after payment of administration fees, costs, expenses, and the payment of creditors other than plaintiff; that as hereinbefore set out the said estate in due course came to the hands of Lee C. Robinson, administrator de bonis non cum testamento annexo, who had actual notice and knowledge of the tax account owing by said James Duggan to the plaintiff according to the order of redetermination made by the United States Board of Tax Appeals as aforesaid; and who in addition thereto had knowledge of the same through proof of claim filed with him on April 24, 1931, by the plaintiff, prior to the final settlement of the estate, through its duly accredited agents and officials; but regardless of said notices and in violation of plaintiff's rights, the said Lee C. Robinson turned over to defendant Henry Duggan the sum of \$500,000.00 bequeathed under Item (2) of the will of James Duggan, and to the defendant Continental National Bank and Trust Company the rest, residue, and remainder of said estate of the total value \$1,500,000.00, and the said defendant Continental National Bank and Trust Company, and said Henry Duggan received the same as distributees under said will without value or consideration other than the terms of said will.

## XI

That aside from the \$500,000.00 turned over to defendant Henry Duggan, the defendant Continental National Bank and Trust Company, as trustee under the said will, has now in its possession the entire corpus of said estate and plaintiff alleges and avers that both the defendant Henry Duggan and the said Continental National Bank and Trust Company, and all the beneficiaries under the terms of said will, holding or claiming any interest whatever in said estate, received and hold same charged with a trust, superior and controlling over any distribution made by the said testator in his said will, in favor of the plaintiff for the payment of said outstanding tax account as redetermined by the United States Board of Tax Appeals, and that plaintiff is entitled in equity to have an accounting for said assets, and that out of same should be paid the tax account aforesaid.

## XII

That this is a suit in equity by the United States of a civil nature arising under a law of Congress providing for internal revenue; and

plaintiff has no clear, adequate, or complete remedy at law against the Johnston City and Big Muddy Coal and Mining Company, or the defendants herein named, nor has the plaintiff any clear, adequate, or complete, or certain remedy against any other persons or corporations through or by which said tax may be collected; and therefore plaintiff brings this suit. That it is useless and vain to proceed against the Johnston City and Big Muddy Coal and Mining Company for judgment or against the estate of the said James Duggan, for that the said Johnston City and Big Muddy Coal and Mining Company has been dissolved and the entire assets of the estate of said James Duggan have been distributed to the defendants as aforesaid.

### XIII

That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

Wherefore, premises considered, the plaintiff comes before this Court and prays:

1. That this Honorable Court order, adjudge, and decree that there is due the plaintiff by James Duggan or his estate the sum of \$295,331.64 with interest thereon as provided by law, from December 6, 1924, the same being due by reason of the fact that the said James Duggan was transferee of the assets of the said Johnston City and Big Muddy Coal and Mining Company in said amount.

2. That this Honorable Court order, adjudge, and decree that the defendants and each of them be accountable to the plaintiff for the aforesaid taxes, with interest and penalties as prescribed by law, to the extent of the amount distributed to and received by them and each of them from and of the assets of the estate of the said James Duggan or to the extent of any amount held in trust for their use and benefit and the income therefrom; and that the said defendants be ordered to pay to plaintiff to the full extent of the amounts distributed to them or held for them in trust until the debt due to plaintiff by the estate of the said James Duggan for taxes as aforesaid be fully paid and discharged.

3. That the plaintiff have such other and further relief as is just and equitable, including a decree for costs.

And may it please the Court to grant unto the plaintiff a writ of subpoena to the United States of America issued out of and under the seal of this Honorable Court directed to the above-named defendants and commanding them on a day certain and under certain penalties therein expressed personally to appear before this Honorable Court then and there to answer all and singularly the premises, answer under oath being expressly waived, and to stand to and perform and abide by such orders, directions, and decrees as may be made against them in the premises; and further that guardians ad litem be appointed according to law to represent and litigate the



questions at issue in behalf of the defendants Martha Duggan and Eugene Duggan, minors as aforesaid, and the plaintiff will ever pray, etc.

(s) GEORGE E. Q. JOHNSON,  
*United States Attorney for the Northern District of Illinois.*

*Exhibit "A" to bill of complaint*

Copy

I, James Duggan, of the County of Dade and State of Florida, being of sound mind and memory, and of disposing capacity, do make, publish, and declare this instrument as and for my Last Will and Testament, hereby revoking any and all former Wills by me at any time made.

(1) I order and direct that all my just debts and funeral expenses be paid as soon as is possible after my decease by my Executor hereinafter named.

(2) I give and bequeath unto my brother, Henry Duggan, the sum of Fifty Thousand (50,000) Dollars.

(3) I give and bequeath unto the Continental National Bank and Trust Company of Chicago, a corporation organized under the laws of the United States of America, as Trustee, the sum of Fifty Thousand (50,000) Dollars.

(4) The net annual income from the said trust estate shall be paid by said Trustee in quarterly installments unto my brother, Timothy Duggan, and such payments of income shall so continue to be made unto him as long as he may live. Upon the death of the said Timothy Duggan, should he be survived by child or children, the said trust shall continue for the benefit of said child or children and the net annual income shall be paid to and equally divided among said children. Upon the attainment of the age of thirty (30) years by the youngest of the children of said Timothy Duggan now living, the said trust shall cease and determine and the trust fund and estate at said time in the hands of said Trustee shall be paid to and divided equally among the children of said Timothy Duggan living at the time of such determination of the trust, the child or children of any deceased child, however, to take and receive its or their parent's share. If any of the children of said [Initials in margin—G. R. P., N. E. O., M. S. C. Page One. James Duggan (Seal)] Timothy Duggan die before such determination of the trust, the income which said deceased child would have received had it continued to live, shall be paid to and divided among the child or children of such deceased child, if any, until such termination of the trust; and if such child of said Timothy Duggan, so having died, leave no child or children, then, such income shall be divided among the other children of the said Timothy Duggan, until such termination of the trust, the child or children of any deceased child, however, to take and receive its

or their parent's share. Should the youngest child now living die before having attained such age of thirty (30) years, such termination of the trust shall be at the time of the attainment of thirty (30) years by the youngest of the now living children of said Timothy Duggan who may live to attain such age. Should the death of said Timothy Duggan occur subsequent to such attainment of such age of thirty (30) years, such termination and division shall be as at the time of the death of said Timothy Duggan. Should said

11 Timothy Duggan so die leaving no child or children surviving and no descendant or descendants of child or children, or should all such children or descendants die before the termination of the trust as hereinbefore provided, then, and in such event, upon the death of the said Timothy Duggan, or upon the death of the last to die of such children or descendants, or in no event at a later period than had been hereinbefore provided, the trust shall *shall* cease and determine and the trust fund and estate shall be paid to The Catholic Charities of the Archdiocese of Chicago, to be used by such Charities as they may see fit.

(5) Should I be survived by my brother, Michael Duggan, then, and in such event, all the rest, residue, and remainder of my estate of whatsoever kind or character, of which at the time of my death I may be seized or possessed, or in which at said time I may have any interest whatsoever, I give, devise, [Initials in margin—G. R. P. N. E. O. M. S. C. Page Two. James Duggan (Seal) and bequeath unto my brother, Michael Duggan.

(6) Should I not be survived by my said brother, Michael Duggan, then, and in such event, all such rest, residue, and remainder of my estate I give, devise, and bequeath unto the Continental National Bank and Trust Company of Chicago, a corporation organized under the Laws of the United States of America, as Trustee, in trust, however, upon the following terms and conditions:

(7) The net income from the said trust estate shall be paid unto my brother, Henry Duggan, quarter annually, such payment of net income to accrue from the date of my death and so to continue to be made unto my said brother as long as he may live.

(8) Upon the death of my said brother, Henry Duggan, the said trust shall cease and determine and the trust estate then in the hands of the said Trustee shall be paid, transferred, and delivered over as may be designated, and appointed in and by the last Will and Testament of my said brother, Henry Duggan.

(9) During the term of the said trusts created by this, my Will, the said Trustee shall hold, manage, care for, and protect said trusts and collect the income therefrom all in accordance with its best judgment and discretion. It may retain as a portion of the said

12 trust estates any investment made by me and which may be delivered to it by my Executor, hereinafter named, as payment of said bequest or of the residuary estate. Said Trustee shall

be paid a fair and just compensation for its services hereunder and shall be allowed its reasonable expenses incurred in managing and protecting said trust estates.

(10) I give unto said Trustee and unto my Executor hereinafter named, respectively, full power and authority at any time and from time to time, to sell, convey, and convert the whole or any part of my estate at such prices and upon such [Initials in margin—G. R. P., N. E. O., M. S. C. Page Three. James Duggan (Seal)] terms and to such persons as to said Trustee or said Executor shall seem proper, and at public or private sale, and also to settle and compound any claims, either in favor of or against my estate, and for the purposes aforesaid, to execute and deliver all necessary and proper conveyances, assignments, and transfers, and to give full receipts and discharges, and in case of any sale of property the purchaser shall not be required to see to the application of the purchase money. Said Executor and said Trustee are given full power and authority to make any division, distribution or partition of my estate or payment of any legacy or charge in securities, property, or cash, and for the purpose, the value which shall be placed upon any such securities or property shall be final and conclusive and such division, distribution, partition, or payment shall be binding upon all concerned.

(11) In making any investments of the said funds of the said trust estates, said Trustee shall obey the instructions of my brothers, Michael Duggan and Henry Duggan, and such instructions when so received, by said Trustee, shall be binding upon it and shall relieve it from any responsibility for such investments when so made. Other than as above indicated, the discretion of said Trustee is unlimited and after the death of both of said parties, no restrictions are placed upon it in making such investments, and such investments are left to its sole discretion. Should, however, one of said parties die, the power and authority given to both of said parties in giving instructions as to such investments shall be vested in the other, or survivor, of said parties.

(12) I desire that all Inheritance and Estate Taxes on the  
13 distributive shares of or interest in my estate, levied under the laws of any state or of the United States, shall be paid by my Executor hereinafter named, out of the principal or residue [Initials in margin—G. R. P., N. E. O., M. S. C. Page Four. James Duggan (Seal)] of my estate, and said Executor shall be allowed to charge such payments as part of the expenses of the administration of my estate.

(13) The beneficiaries under this Will shall have no control over the said Trust Estates, and payments are to be made therefrom as herein directed only upon their proper personal receipts, and they shall have no right or authority to assign or anticipate any income or payment which such beneficiaries or any of them may receive or expect to receive under the provisions of this Will, and the respec-

tive interests of the beneficiaries shall not be liable in any manner or to any extent for the obligations or liabilities of said beneficiaries or for any claims against them.

(14) I direct that if any stocks or securities are retained or purchased by the said Trustee at a premium above their par value, said Trustee is relieved of any duty as to making adjustments of such premiums and is authorized to charge the corpus of the estate with such premiums. Should any securities be bought at a discount, said Trustee shall credit the corpus of the estate with the difference between the purchase price and the amount realized on the collection or sale of said securities. Stock dividends, so-called, shall not be considered as income, but shall be considered as an accretion to the principal of the trust estate. Subject to the foregoing, said Trustee may regard the whole of the interest or dividends received by it as income, and I give to the said Trustee power to determine what expenses, commissions, or charges shall be charged to income and what to principal.

(15) I nominate, constitute, and appoint my brother, Michael Duggan, as Executor of this, my last Will and Testament, and order and direct that no bond other than his personal bond be required of him as such Executor. Should my said brother not survive me or should he decline to act in such [Initials in margin—G. R. P., N. E. O., M. S. C. Page Five. James Duggan (Seal)] capacity, then and in such event, I nominate, constitute, and appoint the

14 Biscayne Trust Company, a corporation of the State of Florida, as Executor of this, my last Will and Testament; and said Trust Company as such Executor shall be and hereby is vested with all rights, privileges, duties, responsibilities, and discretions herein conferred upon my original Executor.

In Witness Whereof, I have hereunto set my hand and affixed my seal, at Tucson, Arizona, this 17th day of January, A. D. 1928.

[SEAL]

JAMES DUGGAN.

• The foregoing instrument, consisting with this and the preceding pages of six (6) typewritten pages, was at the date thereof subscribed by the testator, James Duggan, in our presence, and was at the time declared by him to be his last Will and Testament, and we, at the same time, in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as attesting witnesses, and we do hereby certify that at the time of the execution of the said Will, the said James Duggan was of sound and disposing mind, memory, and understanding.

George R. Powder, Residing at 1049 N. 2nd Ave., Tucson, Ariz.

N. Edw. Olson, Residing at Santa Rita Hotel, Scott & Broadway, Tucson, Ariz.

MaBelle S. Clarke, Residing at 110 E. 2nd St., Tucson, Ariz.

[Initials in margin—G. R. P., N. E. O., M. S. C. Page Six.]



15      *Exhibit "B" to bill of complaint*

Copy

United States Board of Tax Appeals, Washington

Docket No. 17208

JAMES DUGGAN, petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, respondent

DECISION

Pursuant to the Board's findings of fact and opinion promulgated January 6, 1930, the respondent filed a computation of the proposed tax liability on January 17, 1930. Due notice having been given in conformity with the order of the Board and the proceedings having been called for settlement from the Day Calendar of January 21, 1931, at which time there was no appearance on behalf of the petitioner or his estate, it is

Ordered and Decided: That the petitioner's liability as transferee, in respect of income and excess profits taxes of the Johnston City and Big Muddy Coal and Mining Company, for the calendar year 1920, is \$295,331.64 with interest thereon, as provided by law, from December 6, 1924.

(Signed) W. C. Lansdon, Member.

Entered January 27, 1931.

16      In United States District Court

*Petition for appointment of guardian ad litem*

Filed Jan. 7, 1933.

And now comes the United States of America, by Dwight H. Green, United States Attorney for the Northern District of Illinois, its attorney, and shows unto the court that one of the defendants in this cause, namely, Eugene Duggan, is a minor, and respectfully petitions the court for the appointment of a guardian ad litem for said minor defendant.

Dwight H. Green,  
United States Attorney.

In United States District Court

*Order appointing guardian ad litem*

Jan. 7, 1933

On motion of the United States Attorney, the Court being advised in the premises, It Is Ordered that William H. Von Oosterhout be

and he is hereby appointed Guardian ad litem for Eugene Duggan, a minor.

In United States District Court

*Joint and several motion by certain defendants to dismiss bill of complaint*

Filed Jan 16, 1933.

Come now defendants, Continental National Bank and Trust Company, a corporation, Trustee under the last will and testament of James Duggan, deceased, Henry Duggan, Timothy Duggan, Ramona Duggan, and Martha Duggan, by Herbert Pope, their solicitor herein, and said defendants do jointly, and each of them does severally, move the court to dismiss the bill of complaint herein upon the following grounds, to wit:

1. The bill of complaint herein fails to state facts sufficient to constitute a cause of action in favor of plaintiff against these defendants or against any of them.

2. The bill of complaint herein fails to state facts sufficient to constitute a cause of action in equity in favor of plaintiff against these defendants or against any of them.

3. If plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that such cause of action was for the collection of an income and profits tax of the Johnston City and Big Muddy Coal and Mining Company for the calendar year 1920; that said company filed its income and profits tax return on May 16, 1921; that thereafter a deficiency in said tax was assessed against said company in January 1925; and that this cause cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 278 of the Revenue Act of 1926 as amended.

4. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 277 of the Revenue Act of 1926 as amended.

5. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 280 of the Revenue Act of 1926 as amended.

6. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that

this suit cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 311 (b) of the Revenue Act of 1928.

7. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar contained in the applicable statute of limitations.

Wherefore, these defendants do, and each of them does, pray that the whole of the bill of complaint herein may be dismissed and that these defendants and each of them may be hence dismissed with their cost in this behalf incurred; and for such other and further relief as to the court may seem just.

Dated January 16, 1933.

CONTINENTAL NATIONAL BANK,  
AND TRUST COMPANY,

*Trustee under the last will  
and Testament of James Duggan, Deceased.*

HENRY DUGGAN  
TIMOTHY DUGGAN  
RAMONA DUGGAN  
MARTHA DUGGAN

By (Signed) HERBERT POPE, *Their Solicitor.*

19

In United States District Court

*Order extending time*

Feb. 1, 1933

This cause coming on to be heard upon the motion of William H. Van Oosterhout, Guardian ad litem for Eugene Duggan, one of the defendants herein, and it appearing to the court that a motion to dismiss the bill of complaint herein is now pending.

It is, therefore, Ordered, Adjudged, and Decreed that the time for answering said bill of complaint be and the same is hereby extended to Eugene Duggan until the further disposition of the aforesaid motion to dismiss and until the further order of this court.

Enter:

JAMES H. WILKERSON, *Judge.*

Dated: February 1st, 1933.

In United States District Court

*Order granting leave to amend bill of complaint etc.*

Jan. 11, 1937

This day comes the United States of America, by the United States Attorney, and confesses the defendant's motion heretofore made to dismiss the Bill of Complaint, and on motion of the United

States Attorney, It Is Ordered that leave be and the same is hereby given the Plaintiff to amend instanter the Bill of Complaint filed herein.

Whereupon, the defendant by its attorney enters its motion to dismiss the amended Bill of Complaint, and the defendant is to file Brief in support of said motion to dismiss by February 5, A. D. 1937, Government to file Brief by February 19, A. D. 1937, and defendant to file reply brief by March 1, A. D. 1937, and defendant's motion to dismiss the Plaintiff's amended Bill of Complaint is taken under advisement.

In United States District Court

*Motion for leave to amend bill of complaint*

Filed Jan. 11, 1937

*To the Honorable Judge of the District Court of the United States for the Northern District of Illinois:*

The plaintiff, by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, hereby moves for leave to amend its bill of complaint in the above-entitled cause by amending Paragraph IX thereof to read as follows:

"That the outstanding tax account of the said Johnston City and Big Muddy Coal and Mining Company remaining unpaid, and the corporation having been dissolved on December 29, 1921, without available assets in its possession for the payment of said tax account, and there being no assets or property whatsoever of said corporation against which distraint could be made, the Commissioner of Internal Revenue, on April 15, 1926, by registered letter notified James Duggan that under the provisions of Section 280 of the Revenue Act of 1926 there was proposed for assessment against him the sum of \$295,331.64, constituting his liability as transferee of the assets of the Johnston City and Big Muddy Coal and Mining Company of Chicago, Illinois, for an unpaid balance of \$316,468.71, representing income and profits taxes assessed against that corporation for the taxable year 1920. The details of the proposed assessment were

set forth in an attached statement and mailed to said James Duggan, notifying him further that he was allowed sixty days from the date of mailing of the letter within which to file a petition for the redetermination of the deficiency in tax. Thereafterward, upon receipt of said letter and pursuant to the notice sent, the said James Duggan filed a petition before the United States Board of Tax Appeals on June 11, 1926, wherein he protested the assessment of said tax, and upon answer filed by the Commissioner of Internal Revenue, the issue was joined for determination by the United States Board of Tax Appeals. After due consideration and after hearings and orderly proceedings had before said Board of



Tax Appeals on January 27, 1931, an order of redetermination was made and decided by the United States Board of Tax Appeals, wherein the said James Duggan's liability as transferee in respect of income and excess profits taxes of said Johnston City and Big Muddy Coal and Mining Company for the calendar year 1920 was fixed at \$295,331.64 with interest thereon, as provided by law, from December 6, 1924. On February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, under authority of Section 279 of the Revenue Act of 1926 in the sum of \$295,331.64, representing the amount redetermined by the Board of Tax Appeals as the liability of James Duggan as transferee of Johnston City and Big Muddy Coal and Mining Company, together with interest thereon in the sum of \$109,661.09, a total of \$404,992.73, said assessment appearing on the Commissioner's February 14, 1931, List, No. 2, Page 1, Line O.

Six months after entry of the order of redetermination by the Board of Tax Appeals, in accordance with the provisions of law, no petition for review having been filed in the same, and no appeal having been taken therefrom, the said order of redetermination became final, and the obligation of said James Duggan to the plaintiff was duly established whereby he became liable for the payment of the outstanding tax account of the Johnston City and Big Muddy Coal and Mining Company in the said amount of \$295,331.64, as aforesaid, no part of which has been paid, and which is now due to the plaintiff, United States of America, without offset credit or counterclaim. A copy of said order of redetermination by the United States Board of Tax Appeals is hereto attached, marked Exhibit 'B', and is asked to be considered as a part and portion of this section of the bill of complaint."

22 The only change which it is proposed to make in Paragraph IX as amended is to insert an allegation that on February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, in the amount of \$295,331.64, representing the amount redetermined by the Board of Tax Appeals as the liability of James Duggan as transferee of Johnston City and Big Muddy Coal and Mining Company for unpaid income and profits taxes for the year 1920, together with interest thereon in the sum of \$109,661.09, a total of \$404,992.73. This amendment is necessary because the allegation that an assessment was made against James Duggan, deceased, was omitted from the original bill of complaint and is an important fact in determining whether the present action was timely brought against these defendants.

Wherefore, it is prayed that this motion be granted and that the bill of complaint be amended as prayed.

Respectfully submitted.

(s) MICHAEL L. IGOE.

*United States Attorney, Attorney for the Plaintiff:*

January 1937.

## In United States District Court

*Decree*

March 22, 1937

The court having considered the briefs submitted and being now fully advised in the premises,

It Is Ordered that the defendant's motion to dismiss the amended bill of complaint be and the same is hereby sustained—to which ruling of the Court the United States of America by the United States Attorney duly excepts.

It Is Ordered Therefore, that the Plaintiff's amended bill of complaint be and the same is hereby dismissed.

23 In United States District Court

*Notice of appeal*

Filed June 21, 1937

*To Butler, Pope, Ballard & Elting, Herbert Pope, and Benjamin M. Price, 120 South La Salle St., Chicago, Illinois:*

The plaintiff, the United States of America, hereby serves its notice that it will appeal from the decision or judgment entered in the above entitled cause on March 22, A. D. 1937.

M. L. Igoe (B)

MICHAEL L. IGOE,

*United States Attorney.*

Received a copy of the above and foregoing Notice of Appeal this 19th day of June, A. D. 1937.

BENJAMIN M. PRICE,  
*Attorney for Defendants.*

In United States District Court

*Petition for appeal*

Filed June 21, 1937

*To the Honorable Judges of the District Court of the United States for the Northern District of Illinois:*

Now comes the United States of America, plaintiff in the above entitled action, by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, as petitioner, and respectfully shows that on the 22nd day of March, 1937, the Court sustained the defendants' motion to dismiss the amended bill of complaint and ordered that plaintiff's amended bill of complaint be dismissed.

Your petitioner feeling itself aggrieved by the said judgment, pursuant to the authority and direction of the Attorney General of the United States of America, herewith petitions the Court for an order allowing it to prosecute an appeal in the United States Circuit Court of Appeals for the Seventh Circuit under the laws of the United States in such cases made and provided.

Wherefore, the premises considered, your petitioner prays that an appeal in this behalf be allowed to the United States Circuit Court of Appeals for the Seventh Circuit, City of Chicago, State of Illinois, in said Circuit, for the correction of the errors complained of and herewith assigned, and that an order be entered allowing the said appeal without bond of the plaintiff, it appearing that the above entitled cause is one in which the United States is the real party in interest and that this petition for appeal is filed pursuant to the authority and direction of the Attorney General of the United States.

Dated this 21st day of June A. D. 1937.

M. L. Igoe (P).  
MICHAEL L. IGOE,  
*United States Attorney.*

In United States District Court

*Assignment of errors*

Filed June 21, 1937

Now comes the plaintiff, by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, and assigns the following errors upon which it will rely upon its appeal from the decree entered in this cause on March 22, 1937, to the United States Circuit Court of Appeals for the Seventh Circuit:

25

I

The Court erred in granting the defendants' motion to dismiss and in ordering the plaintiff's bill of complaint, as amended, dismissed.

II

The Court erred in failing and refusing to deny the defendants' motion to dismiss.

III

The Court erred in failing and refusing to hold that the plaintiff's action was timely instituted and that the prosecution of the action is not barred by any statute of limitations.

## IV

The Court erred in failing and refusing to hold that the plaintiff's bill of complaint, as amended, alleges facts sufficient to constitute a good cause of action against the defendants.

## V

The Court erred in not making findings of fact and conclusions of law as required by Rule 70 $\frac{1}{2}$  of the General Equity Rules promulgated by the United States Supreme Court.

## VI

The Court erred in entering its decree of March 22, 1937, dismissing the plaintiff's bill of complaint.

Wherefore, the plaintiff prays that the decree of March 22, 1937, be reversed and that judgment be entered herein in its favor upon the demands set forth in the bill of complaint in this case.

M. L. IGOE P

*United States Attorney.*

D. L. BRAZELOW P

*Assistant United States Attorney.*

26

In United States District Court

*Order allowing appeal*

June 21, 1937

This cause coming on to be heard on the petition of the United States of America, the said plaintiff appearing by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, for an order allowing it to prosecute an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and it appearing that notice of this proceeding has been given to the defendants.

It Is Ordered in open court that the prayer of the said petitioner be and the same hereby is allowed, and the appeal prayed for by the said petitioner is hereby granted and allowed without bond of the plaintiff, it appearing that the above entitled cause is one in which the United States is the real party in interest, and this appeal is being taken by the direction and authority of the Attorney General of the United States of America.

Dated this 21st day of June A. D. 1937.

Enter:

CHARLES E. WOODWARD,  
*United States District Judge.*

In United States District Court:

*Amended praecipe for transcript of record*

Filed July 3, 1937

To Henry W. Freeman, Esq., Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit under the appeal heretofore allowed in the said cause, and include in said transcript the following:

1. Placita.
2. Complaint filed May 6, 1932.
3. Petition for appointment of guardian ad litem, filed January 7, 1933.
4. Order appointing guardian ad litem, dated January 7, 1933.
5. Joint and several motion of Continental National Bank & Trust Co., Henry, Timothy, Ramona, and Martha Duggan to dismiss.
6. Order of February 1, 1933, extending time of Eugene Duggan to answer until disposition of the motion to dismiss.
7. Motion for leave to amend bill of complaint herein, filed January 11, 1937.
8. Order entered January 11, 1937.
9. Order of March 22, 1937, sustaining defendants' motion to dismiss amended bill of complaint, and exceptions by plaintiff.
10. Notice of appeal, filed June 21, 1937.
11. Petition for appeal, filed June 21, 1937.
12. Assignment of errors, filed June 21, 1937.
13. Order allowing appeal, filed June 21, 1937.
14. Citation, filed June 21, 1937.
16. Amended praecipe for record.

The said transcript is to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

Michael L. Igoe (T.)

MICHAEL L. IGOE,

*United States Attorney,*

Service is hereby acknowledged of a copy of the above and foregoing Amended Praecipe this 3rd day of July, A. D. 1937.

BENJAMIN M. PRICE.

28 [Clerk's Certificate to foregoing transcript omitted in printing.]

[Citation in usual form showing service on Benjamin M. Price filed June 21, 1937; omitted in printing.]



6332

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION,  
TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN,  
DECEASED, ET AL., DEFENDANTS-APPELLEES

*Minute entry of argument and submission*

Nov. 1, 1937

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Fred E. Youngman, counsel for appellant, and by Mr. Herbert Pope, counsel for appellee, and the Court having heard the same takes this matter under advisement.

32 In United States Circuit Court of Appeals for the Seventh Circuit

No. 6332, October Term and Session, 1937

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION,  
TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN,  
DECEASED, ET AL., DEFENDANTS-APPELLEES

*Opinion*

Filed January 5, 1938

Before EVANS, SPARKS, and MAJOR, Circuit Judges

SPARKS, Circuit Judge: This appeal presents the question of the liability of the distributees under the will of James Duggan, deceased, for a tax liability alleged to have been due from him as transferee of the assets of a dissolved corporation. The Government filed

suit in equity against the testamentary trustee and beneficiaries under the will of Duggan, deceased. Its bill of complaint was dismissed, and it is from the order of dismissal that this appeal is prosecuted.

The facts relied upon to sustain the prayer for relief against the distributees were substantially as follows: James Duggan died testate in March 1929, naming the Biscayne Trust Company, of Florida, the executor of his will. Shortly after its appointment it was placed in the hands of a receiver and dismissed as executor, and on September 15, 1930, Lee C. Robinson was appointed and qualified as administrator de bonis non. During the years 1919 and 1920, Duggan had been the principal owner and stockholder of the Johnson City and

Big Muddy Coal and Mining Company, an Illinois corporation which with a subsidiary filed a consolidated income and profits tax return for the year 1920 on May 16, 1921, and paid the tax due thereon. An additional return was filed in February 1922, showing additional taxes due for the year 1920. Upon investigation by the Commissioner, a deficiency was determined in the amount of \$316.620, and a sixty-day letter to that effect was sent to the taxpayer on December 24, 1924. No appeal being taken from this determination, assessment was made on the January 1925 list.

During the years 1920 and 1921, the main corporation was in process of dissolution, and during the course of it, there were transferred to Duggan as president and principal stockholder, assets belonging to it in the amount of \$295,331 for which he paid no consideration. The bill alleges that these assets, in the form of funds and negotiable securities, were received by Duggan impressed with a trust in favor of the United States for the payment of the tax account due from the corporation. On April 15, 1926, the Commissioner notified Duggan of a proposed assessment against him in the amount of the funds received by him from the corporation, constituting his liability as transferee of its assets. On June 11, 1926, Duggan filed a petition before the Board of Tax Appeals protesting the assessment. After hearing, and subsequent to Duggan's death, the Board filed its order of redetermination on January 27, 1931, fixing decedent's liability as transferee at \$295,331, with interest from December 6, 1924. The bill further alleged that six months thereafter, no petition for review having been filed, and no appeal having been taken, this order became final, and a copy of it was attached to the bill of complaint. The bill further stated that Robinson, decedent's administrator, had actual notice and knowledge of the tax account owing by Duggan "according to the order of redetermination \* \* \* and, in addition thereto \* \* \* through proof of claim filed with him on April 24, 1931, by the plaintiff \* \* \* prior to the final settlement of the estate \* \* \*."

Relief was prayed in equity against the testamentary trustee and beneficiaries for the reason that there was no adequate remedy at law against the dissolved corporation or against the estate of the decedent, the assets of which had been distributed to appellees. The

court was therefore asked to decree that there was due from Duggan or his estate the sum of \$295,331 by reason of the fact that Duggan was transferee of the assets of the dissolved corporation in that amount, and that appellees, and each of them, be held accountable for the amount distributed to and received by them from the estate of Duggan.

The bill of complaint was filed against appellees on May 6, 1933. On January 16, 1933, they filed a motion to dismiss it on the grounds that it did not state facts sufficient to constitute a cause of action; that if appellant had ever had a cause of action against them by reason of the allegations of the bill it could not be maintained because of the bar of the statute of limitations contained in sections 277 and 280 of the Revenue Act of 1926, and section 311 (b) of the Revenue Act of 1928. On January 11, 1937, appellant confessed appellees' motion to dismiss the complaint, and by leave of court filed an amended bill of complaint instanter. The amended bill added only the fact that, on February 14, 1931, the Commissioner made a jeopardy assessment against Duggan, deceased, in the sum of \$295,331, together with interest thereon in the sum of \$109,661, representing the amount redetermined by the Board of Tax Appeals as the liability of Duggan as transferee, said assessment appearing on the Commissioner's February 14, 1931, list.

It will be noted that nothing is said in the bill of complaint as to substitution in the proceedings before the Board of the decedent's representatives. For facts as to this we refer to a memorandum of the Board entered December 16, 1930, prior to its order of redetermination, 21 B. T. A. 740. From this we learn that on April 29, 1929, after submission of the case for decision, counsel for decedent filed with the Board his suggestion of the death of his client. On January 6, 1930, the Board promulgated its report. On January 16, 1930, the Commissioner moved the substitution of the Biscayne Trust Company, executor under the will of decedent, as petitioner in the proceeding, submitting a certified copy of letters testamentary issued to it on April 15, 1929. Substitution was ordered by the Board on January 21, 1930. Notice was thereafter sent to the Biscayne Company on February 7, 1930, of a hearing on recomputation to be held March 5, 1930. On March 1, counsel for the substituted petitioner appeared specially to move that the order of substitution be vacated. On March 5, there was further argument by both parties on the motion to vacate, and counsel for the Commissioner also argued as to the recomputation. On April 14, the order of substitution was vacated, and on April 28, on application of the Commissioner, a rule to show cause why it should not be substituted was issued against the Biscayne Company, a copy being delivered to Lee C. Robinson, its vice-president. On September 20, counsel for the Biscayne Company filed suggestion that it was no longer executor of the estate of decedent, having suspended opera-

tions June 30, and that it was understood that Lee C. Robinson was acting as administrator de bonis non. A copy of this paper was served upon the Commissioner but he took no further action with regard to the matter. Prior to the order of redetermination, notices were sent by the Board to decedent at his last known address, to Robinson, and to the Biscayne Company. Under these circumstances the Board held that it had jurisdiction to enter a valid final order in the proceeding, and thereupon, on January 27, 1931, entered its decision. The Government argues that this order of redetermination was valid and binding, and together with the jeopardy assessment made the following month, operated to fix the liability of Duggan as transferee of the dissolved corporation so that it could proceed at any time within a six-year period following the assessment to collect from anyone into whose hands the assets of the transferee had passed.

Section 277 (a) (3) of the Revenue Act of 1926 provides a five-year period of limitation for assessment of taxes imposed by certain earlier Acts.<sup>1</sup> Section 278 (d) as amended by section 506 of the Act of 1928 provides for a six-year period of limitation for the collection of such taxes.<sup>2</sup>

Section 280 of the 1926 Act provides a method for the assessment and collection of claims against transferred assets.<sup>3</sup> It will be noted that this section provides for the fixing of the liability of transferees of taxpayers, and limitations on the assessment of such liability. The parties were proceeding under this section when the transferee died. Thereafter a final order of redetermination was entered by the Board in his name, and a jeopardy assessment levied. Appellants contend that the entry of this jeopardy assessment operated to start the running of the period of limitations provided in section 278 (d) against collection, hence gave them until February 1937 to collect the liability of Duggan by suit or otherwise. We cannot agree with this contention in view of section 311 (b) of the Act of 1928 which provides as follows:

"(2) In the case of the liability of a transferee of a transferee of the property of the taxpayer—within one year after the expiration of the period of limitation for assessment against the preced-

<sup>1</sup> Sec. 277 (a) (3). The amount of income, excess-profits, and war-profits taxes imposed by Act of 1918 . . . shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

<sup>2</sup> Sec. 278 (d). Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

<sup>3</sup> Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand,



37 ing transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;—except that if before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding.”

We think it is clear from this that Congress did not intend to allow a six-year period of limitation for the collection of each successive transfer of the liability of the original tax. It must be noted that section 278 provides for collection by distraint or court proceeding but only if begun within six years after the assessment of the tax, while section 280 provides for the assessment of the liability of a transferee of property of a taxpayer in respect of the tax. The limitations of the latter section have to do only with assessment, not with collection. We think it was not intended that the six-year provision of section 278 should be read into it. No provision is made in section 280 with respect to the liability of transferees of transferees. Such provision appears for the first time in the 1928 Act, as above, and we consider that it is entirely applicable here. The question then is whether or not the proceeding against these transferees was brought within the limited period there provided.

The return of the corporate taxpayer which gave rise to the liability here sought to be collected was filed May 16, 1921. The period for

the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) (As amended by section 505 of the Act of 1928) The running of the statute of limitations under the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

(f) As used in this section, the term “transferee” includes heir, legatee, devisee, and distributee.



assessment, therefore, ran until May 1926. Hence, unless the limitation period was suspended by the starting of a court proceeding against the taxpayer or last transferee, the assessment of the liability of the transferee of the transferee was barred after May 1929, in spite of the fact that the period of limitation for assessment against the preceding transferee did not expire until July 27, 1931, when the decision of the Board became final.<sup>4</sup> While we have grave doubts as to the validity of the order of redetermination entered ex parte by the Board, January 27, 1931, almost two years after the Government had knowledge of Duggan's death, we do consider that under the provision of amended section 280 (d) the period of limitation against the assessment of the liability of Duggan did not expire until that order became final. See *American Equitable Assur. Co. v. Helvering*, 68 F. (2d) 46. However, we construe section 311 (b) to mean that the liability of the transferee of a transferee may be assessed within one year after the expiration of the period of limitation for assessment against the preceding transferee only if within three years after the expiration of the period for assessment of the taxpayer, and that only a court proceeding against the taxpayer or preceding transferee brought before the period expires as to them can keep alive rights against a subsequent transferee, and then only for a limited time. It is unnecessary for us to determine here whether, upon a showing that the estate had been closed prior to the expiration of the period for assessment, so that suit against the estate would be futile, a suit against distributees brought within that period would be effective to keep alive the liability as against those distributees. Here the suit was started almost ten months after the expiration of the period for assessment of Duggan, and the fact that a jeopardy assessment was made within the period does not render these transferees liable for its payment in the absence of a court proceeding started before the expiration of the period of limitation for assessment of the preceding transferee. It follows that the bill of complaint did not set up a good cause of action, hence, was properly dismissed.

Decree affirmed.

<sup>4</sup>Section 1005 (a) of the 1926 Act provides that the decision of the Board shall become final upon the expiration of the time allowed for filing a petition for review, which under section 1001 (a) of that Act is fixed at six months.

6332

Appeal from the District Court of the United States for the Northern  
District of Illinois, Eastern Division

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION,  
TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN,  
DECEASED, HENRY DUGGAN, MARTHA DUGGAN, TIMOTHY DUGGAN,  
RAMONA DUGGAN, EUGENE DUGGAN, THE LAST TWO NAMED BEING  
MINORS; AND THE CATHOLIC CHARITIES OF THE ARCHDIOCESE OF  
CHICAGO, A RELIGIOUS CORPORATION, DEFENDANTS-APPELLEES.

*Judgment*

January 5, 1938

This cause came on to be heard on the transcript of the record from  
the District Court of the United States for the Northern District of  
Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and  
decreed by this Court that the Decree of the said District Court in  
this cause be and the same is hereby affirmed.

40 [Clerk's certificates to foregoing transcript omitted in print-  
ing.]

42

Supreme Court of the United States

*Order allowing certiorari*

Filed May 16, 1938

The petition herein for a writ of certiorari to the United States  
Circuit Court of Appeals for the Seventh Circuit is granted. And it  
is further ordered that the duly certified copy of the transcript of the  
proceedings below which accompanied the petition shall be treated  
as though filed in response to such writ.

[Endorsement on cover:] File No. 42,415. U. S. Circuit Court of  
Appeals, Seventh Circuit. Term No. 22. The United States of  
America, Petitioner, vs. Continental National Bank and Trust Com-  
pany, Trustee under the last will and testament of James Duggan,  
Deceased, et al. Petition for a writ of certiorari and exhibit thereto.  
Filed April 5, 1938. Term No. 22 O. T. 1938.



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U.S. Supreme Court, D.C.  
FILED  
APR 5 1937  
CHARLES ELMORE DUFFLEY  
CLERK

No. [REDACTED] 22

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1937**

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**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
A CORPORATION, TRUSTEE UNDER THE LAST WILL  
AND TESTAMENT OF JAMES DUGGAN, DECEASED,  
ET AL.**

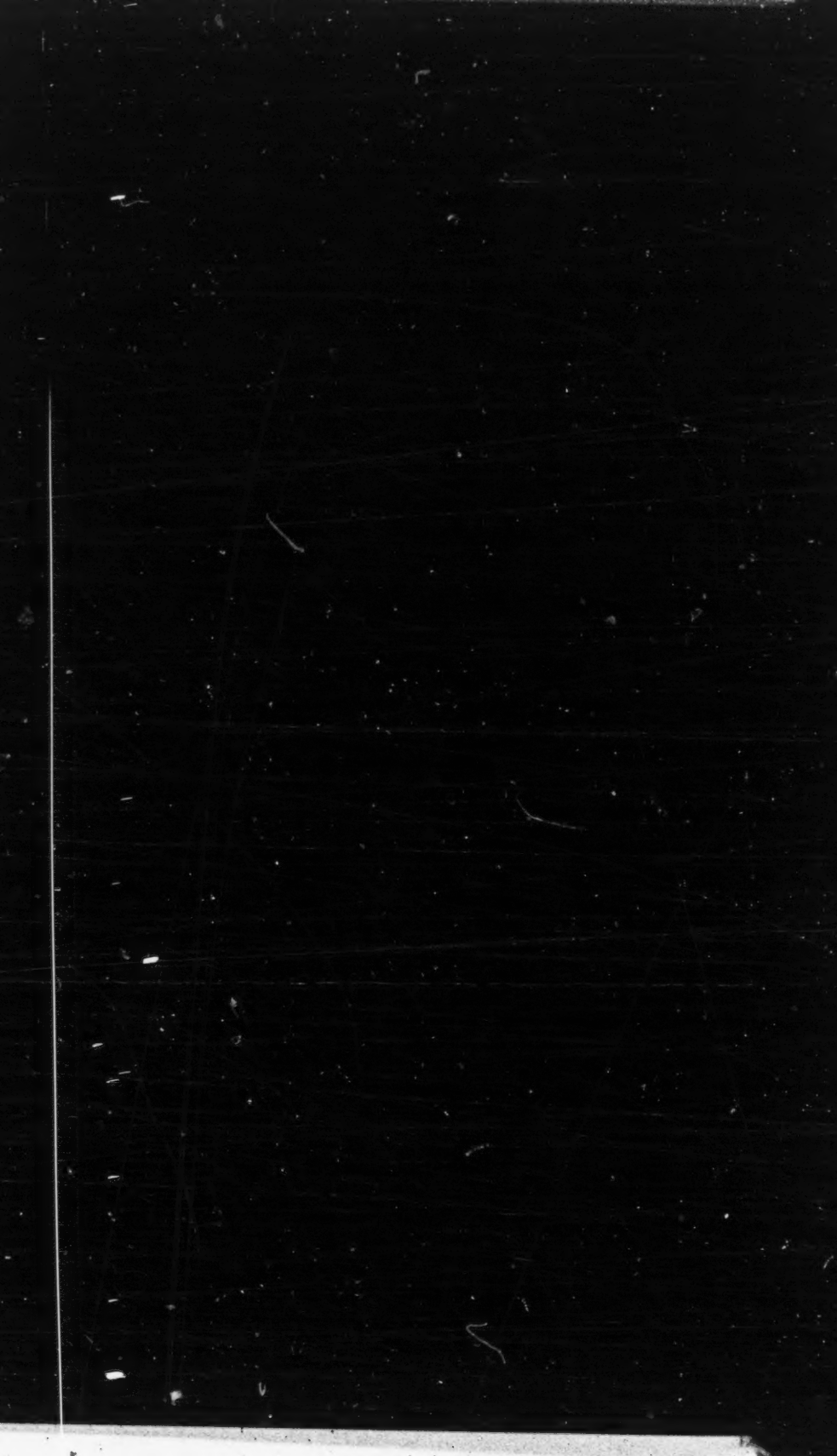
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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEV-  
ENTH CIRCUIT**

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# In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 934

UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
A CORPORATION, TRUSTEE UNDER THE LAST WILL  
AND TESTAMENT OF JAMES DUGGAN, DECEASED,  
ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEV-  
ENTH CIRCUIT :

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above cause on January 5, 1938, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

## OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 32) is reported in 94 F. (2d) 81. The District Court did not file a written opinion.

(1)

**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered January 5, 1938 (R. 37). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTIONS PRESENTED**

1. Whether the limitations period provided by Section 311 (b) (2) of the Revenue Act of 1928 is applicable in a proceeding to collect from the representatives of a deceased transferee of the taxpayer the amount of the transferee's liability for taxes imposed by earlier Revenue Acts.
2. Whether this action was barred by any applicable provision of the Revenue Act of 1926.

**STATUTES INVOLVED**

The pertinent statutes involved are printed in the Appendix, *infra*, pp. 18-27.

**STATEMENT**

This is a suit in equity, brought by the petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, against the Continental National Bank and Trust Company, as trustee under the will of James Duggan, deceased, to collect the sum of \$295,331.64, with interest as provided by law, representing the amount of the liability of James Duggan, deceased, for unpaid Federal income and profits taxes.



amounting to \$316,620.61 due from Johnston City & Big Muddy Coal & Mining Company, a dissolved Illinois corporation, for the calendar year 1920. The other defendants named in the bill of complaint are beneficiaries of the testamentary trust created by the decedent.

The defendants moved to dismiss the petitioner's bill of complaint for the following reasons (R. 17-18):

1. The bill of complaint herein fails to state facts sufficient to constitute a cause of action in favor of plaintiff against these defendants or against any of them.

2. The bill of complaint herein fails to state facts sufficient to constitute a cause of action in equity in favor of plaintiff against these defendants or against any of them.

3. If plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that such cause of action was for the collection of an income and profits tax of the Johnston City and Big Muddy Coal and Mining Company for the calendar year 1920, that said company filed its income and profits tax return on May 16, 1921; that thereafter a deficiency in said tax was assessed against said company in January 1925; and that this cause cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 278 of the Revenue Act of 1926 as amended.

4. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 277 of the Revenue Act of 1926 as amended.

5. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 280 of the Revenue Act of 1926 as amended.

6. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar of the statute of limitations contained in the provisions of section 311 (b) of the Revenue Act of 1928.

7. If the plaintiff ever had any cause of action against these defendants or against any of them by reason of the allegations of the bill of complaint herein, it appears from said bill of complaint that this suit cannot be maintained by plaintiff by reason of the bar contained in the applicable statute of limitations.

Before the defendants' motion to dismiss was acted upon by the District Court the petitioner's original bill of complaint (R. 2-15) was amended by leave of court (R. 20-22) to include the additional allegation of fact that on February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, in the sum of \$295,331.64 representing the amount redetermined by the Board of Tax Appeals as his liability for unpaid taxes due from the Johnston City & Big Muddy Coal & Mining Company. The defendants' motion to dismiss was thereupon renewed (R. 19-20). Briefs were thereafter submitted to the District Court by both parties but oral argument was not heard. On March 22, 1937, the District Court entered an order, without written opinion, dismissing the petitioner's bill of complaint (R. 22-23). The order of dismissal was affirmed by the Circuit Court of Appeals for the Seventh Circuit in an opinion filed January 5, 1938 (R. 32).

The bill of complaint (R. 2-15), as amended (R. 20-22), shows that James Duggan, deceased, was, during the years 1919 and 1920, the principal owner and stockholder of Johnston City & Big Muddy Coal & Mining Company, an Illinois corporation engaged in the business of mining and selling coal; and that the Johnston City & Big Muddy Coal & Mining Company owned a subsidiary corporation organized under the laws of Illinois and known as the Johnston City Coal Company (R. 4).

For the calendar year 1920, the Johnston City & Big Muddy Coal & Mining Company filed a consolidated income and profits tax return which included the income and deductions of Johnston City Coal Company. A tax of \$5,269.21 shown thereon to be due was paid (R. 4).

Upon auditing the return filed by Johnston City & Big Muddy Coal & Mining Company for 1920 the Commissioner of Internal Revenue found that the income of the company had been grossly understated, and that there was due from the company an additional tax for 1920 in the sum of \$316,620.61. A statutory deficiency notice under Section 274 (a) of the Revenue Act of 1924 was mailed to the company under date of December 16, 1924, notifying it of this proposed deficiency. No appeal from this notice was taken to the Board of Tax Appeals by the company. The amount of this deficiency was assessed against the company by the Commissioner on his January 1925 list but no part of the assessment has ever been paid (R. 5).

During 1920 and 1921 the Johnston City & Big Muddy Coal & Mining Company was in process of liquidation. Its assets were converted into cash and commercial securities under the direction of James Duggan, and as a stockholder in the company he received and kept in his possession assets of the corporation to the amount of \$295,331.64 which were converted to his own use and purposes without payment or rendering value therefor in re-

7  
turn, and without paying or discharging the obligation of the company to the Government of the United States for the unpaid income and profits taxes assessed against it for the year 1920 (R. 5).

The Johnston City & Big Muddy Coal & Mining Company was dissolved December 29, 1921, and was left without assets available to pay the taxes assessed against it in January 1925. Thereupon the Commissioner, by a registered letter dated April 15, 1926, notified James Duggan that under the provisions of Section 280 of the Revenue Act of 1926 there was proposed for assessment against him the sum of \$295,331.64, constituting his liability at law or in equity as a transferee of the assets of Johnston City & Big Muddy Coal & Mining Company for the unpaid taxes assessed against the company (R. 20-21).

Upon receipt of this notice James Duggan filed an appeal with the United States Board of Tax Appeals, issue was joined, and the appeal came on for hearing in due course. On January 6, 1930, the Board promulgated its findings of fact and opinion. On January 27, 1931, it entered its decision in the appeal of James Duggan wherein his liability as transferee for income and profits taxes of Johnston City & Big Muddy Coal & Mining Company for the year 1920 was fixed at \$295,331.64, with interest thereon as provided by law from December 6, 1924. No appeal was taken from the decision of the Board within the time provided by law and the de-



cision became final six months thereafter (R. 15, 20-21). See 18 B. T. A. 608.

On February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, under authority of Section 279 of the Revenue Act of 1926 in the sum of \$404,992.73, representing the amount redetermined by the Board of Tax Appeals to be his liability as transferee of the assets of Johnston City & Big Muddy Coal & Mining Company plus interest thereon in the sum of \$109,661.09 (R. 21).

James Duggan died testate in March 1929, leaving an estate worth approximately \$1,500,000 after payment of administration expenses and claims other than the claim of the Government for the above \$295,331.64, plus interest. Michael Duggan, who was named executor in his will, had died previously, and the Biscayne Trust Company, of Miami, Florida, was duly appointed and qualified as executor. The Biscayne Trust Company became financially involved and was placed in the hands of a receiver, and was formally dismissed as such executor. Thereafter Lee C. Robinson was appointed and qualified as administrator d. b. n. c. t. a. on September 15, 1930 (R. 4, 7).

Lee C. Robinson, while having actual notice and knowledge of the claim against James Duggan, deceased, distributed to Henry Duggan, one of the defendants named in the bill of complaint, the sum

of \$50,000 pursuant to the terms of James Duggan's will, and distributed to the Continental National Bank & Trust Company, as testamentary trustee, all of the rest and residue of the estate of James Duggan, deceased. The Continental National Bank & Trust Company, as trustee under the will of James Duggan, now has in its possession the entire corpus of the estate of James Duggan distributed to it as such testamentary trustee (R. 7-8).

No part of the obligation of James Duggan, deceased, as established by the Board of Tax Appeals has ever been paid (R. 21).

In affirming the order of dismissal, the Circuit Court of Appeals held that the six-year period provided by Section 278 (d) of the 1926 Act for collection, following a timely assessment, from the original taxpayer was not made applicable by Section 280 (a) of that Act to a proceeding, following a timely assessment, for collection from a transferee. Apparently considering that the 1926 Act provided no limitations period for such proceedings, the court held that this hiatus had been filled by the Revenue Act of 1928. Applying Section 311 (b) (2) of that Act, it held that this suit was barred since it had not been brought within three years after expiration of the period for assessment against the original taxpayer.

### **SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

1. In holding that this action was barred by the provisions of Section 311 (b) of the Revenue Act of 1928 at the time it was instituted, and in affirming the judgment of the District Court on that ground.

2. In holding that this action was barred by any applicable statute of limitations at the time it was instituted.

3. In failing to hold that this action was timely brought within the period of limitation properly applicable.

4. In affirming the judgment of the District Court dismissing this action.

### **REASONS FOR GRANTING THE WRIT**

1. The court below held that this action is barred by the provisions of Section 311 (b) (2) of the Revenue Act of 1928. In so holding the court based its decision upon a provision of law which upon its face, is clearly inapplicable to the facts in this case. In this respect the decision is contrary to the decision of the Board of Tax Appeals in *Hoosac Mills Corp. v. Commissioner*; 29 B. T. A. 1057, reversed on another issue, 75 F. (2d) 462 (C. C. A. 1st), which is the only other case passing upon this question. This is a proceeding to collect a sum representing the liability of James Duggan, deceased, for income and profits taxes due for the

taxable year 1920. Section 311 of the Revenue Act of 1928 is a part of Title I of that Act. Section 1 of the Act specifically provides that the provisions of Title I "shall apply only to the taxable year 1928 and succeeding taxable years." Section 311 applies specifically to the liability of a transferee "in respect of the tax \* \* \* imposed upon the taxpayer by this title." Accordingly, the period of limitations applicable to suits to collect the liability of transferees for taxes imposed for prior years must be found elsewhere.

Section 311 (b) (2) of the Revenue Act of 1928 is not applicable to this proceeding for the further reason that it prescribes a new period for *assessment* against a *transferee of a transferee* while the instant action is a proceeding in court to *collect* from the assets of his estate now held by the Continental National Bank & Trust Company, as testamentary trustee, the liability of the *initial* transferee which has already been redetermined by the Board of Tax Appeals and *assessed* by the Commissioner. The suit is brought against the trustee in its representative capacity, and does not seek to subject the trustee to liability as transferee of a transferee. See Section 281 (b) of the Revenue Act of 1926. In treating this action as an action against a transferee of a transferee, and in basing its decision upon a provision of law which is clearly inapplicable to the facts alleged, the court below has reached a result which clearly is erroneous and

which is inconsistent with a proper application of the applicable provisions of law and supporting authorities.

2. The provisions of law properly applicable to this proceeding are contained in the Revenue Act of 1926. The time prescribed by that Act had not expired when this proceeding was begun.

The 1920 income tax return of the Johnston City & Big Muddy Coal & Mining Company was filed May 16, 1921, and the Commissioner of Internal Revenue had five years, or until May 16, 1926, within which to make an assessment against the company. Section 277 (a) (3) of the 1926 Act. He made an assessment against the company in January 1925 in the amount of \$316,620.61, but this is immaterial and may be ignored, because under Section 280 (b) (1) of the 1926 Act he had one year after expiration of the period for assessment against the company, or until May 16, 1927, within which to assess the liability of transferees of the company. The fact that the company had been dissolved in the meantime did not interrupt this period. Section 280 (c) of the 1926 Act.

On April 15, 1926, prior to the expiration of the period for assessment against the company, and thirteen months and one day prior to expiration of the period for assessment against transferees of the company, the Commissioner mailed a transferee notice to James Duggan pursuant to Section 280 (a) of the Revenue Act of 1926, from which a



timely appeal was taken to the Board of Tax Appeals. After issuance of the transferee notice, and since an appeal was filed, the Commissioner was prohibited by Section 274 (a) of the 1926 Act from making an assessment against James Duggan, except in case of jeopardy, and also from bringing a proceeding against him for collection, until the decision of the Board became final.

The running of the period of limitation upon assessment against Duggan was "suspended" by Section 280 (d) of the 1926 Act, as amended by Section 505 (a) of the 1928 Act, for the period during which the Commissioner was prohibited by Section 274 (a) from assessing or attempting to collect from James Duggan, and for 60 days thereafter. This is true regardless of whether the Board lost jurisdiction of the proceeding pending before it at the time of James Duggan's death because of the failure to substitute his personal representatives. See *American Equitable Assur. Co. of New York v. Helvering*, 68 F. (2d) 46 (C. C. A. 2d); and *USL Battery Corp. v. Commissioner*, 84 F. (2d) 1020, affirming 32 B. T. A. 810.

The Board's decision was entered January 27, 1931, and became final on July 27, 1931. Section 1005 (a) of the Revenue Act of 1926. The period of "suspension" of the statute of limitations, under Section 280 (d) of the Revenue Act of 1926, continued for 60 days thereafter, or until September 25, 1931. When this period of "suspension" came

to an end, there remained an unexpired period of thirteen months and one day within which the Commissioner might make an assessment against James Duggan as a transferee, or might institute a proceeding against him or his representatives for collection without assessment. That Section 280 (d) of the Revenue Act of 1926 does thus operate to "suspend" the running of the limitation period so as to permit utilization, after the suspension has terminated, of that portion of the limitation period which remained when the transferee notice was mailed, is clear from the plain language of the statute. It was so held in *Continental Oil Co. v. United States*, 14 F. Supp. 533 (C. Cls.), certiorari denied, 299 U. S. 510. The present proceeding was brought on May 6, 1932. It was, therefore, clearly timely whether viewed as a proceeding for collection after assessment or as one for collection without assessment.

3. (a) Even if the interpretation of the statute adopted in the *Continental Oil Co.* case, *supra*, be incorrect, the present suit was timely. The suspension authorized by Sections 277 (b) and 280 (d) of the Revenue Act gave the Commissioner at least until 60 days after July 27, 1931—namely, until September 25, 1931—within which to make an assessment against James Duggan. A jeopardy assessment, under authority of Section 279 (a) and (d) of the Revenue Act of 1926, was made against James Duggan, deceased, on February 14,

1931. This assessment, being made within the assessment period as extended by the Board proceeding, clearly was in time. The fact that James Duggan had died prior to the date on which this assessment was made does not preclude the Commissioner from bringing a proceeding for collection against the representatives of his estate within that period. Assessments are frequently made by the Commissioner after a dissolution of a corporation (*United States v. Updike*, 281 U. S. 489), or after the death of an individual. *Muir v. United States*, 3 F. Supp. 619 (C. Cls.); *Anderson v. United States*, 15 F. Supp. 216, certiorari denied, 300 U. S. 675; and *Anderson v. United States*, 15 F. Supp. 225 (C. Cls.). See, also, *Anderson v. Bass*, 88 F. (2d) 185 (C. C. A. 5th). The courts have never for that reason held assessments ineffective for purposes of the statute of limitations.

(b) The assessment having been made in time, the Commissioner had six years from the date of that assessment, or until February 14, 1937, within which to collect by distraint or by a proceeding in court under Section 278 (d) of the 1926 Act. The court below clearly erred in holding that the six-year collection period provided by this section should not be read into Section 280 of the 1926 Act. Its decision in this respect is in substantial conflict with the decisions of this Court in *United States v. Updike*, 281 U. S. 489, and *Helvering v. Newport Co.*, 291 U. S. 485. Section 280 (a) of the

1926 Act provides that the amounts of the liabilities therein dealt with—

\* \* \* shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including \* \* \* the provisions authorizing distraint and proceedings in court for collection, \* \* \*

This provision authorizes collection of a transferee liability by distraint or a proceeding in court if brought within six years after assessment of the liability. *United States v. Updike, supra*, was a suit by the Government against transferees to collect taxes due from a dissolved corporation for the year 1917. No return for the period involved had been filed by the corporation prior to its dissolution. In October 1918, a revenue agent examined the books of the corporation and made a return in regular form which apparently was sufficient to start the running of the statutory period for assessment. In January, 1920, an additional tax was assessed against the company. The suit was brought against transferees of the company in 1927, more than six years later, to collect the amount of that assessment. This Court held the six-year period provided in Section 278 (d) of the 1926 Act to be applicable to the facts of that case.

*Helvering v. Newport Co., supra*, was a proceeding under Section 280 of the Revenue Act of 1926

to collect from the transferee of a dissolved corporation its liability for taxes due from the dissolved corporation for the taxable year 1917. In that case this Court held that the applicable limitations provisions contained in Sections 277 and 278 of the 1926 Act were by Section 280 (a) of the Act made applicable to proceedings against transferees under the latter section. Under that decision the provisions of Section 278 (d) of the 1926 Act, as amended, are clearly applicable to any proceeding in court to collect the amount redetermined by the Board of Tax Appeals and assessed against James Duggan, deceased, as his liability under Section 280 of the Act.

In this respect the decision below also appears to be in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *City Nat. Bank v. Commissioner*, 55 F. (2d) 1073, certiorari denied, 286 U. S. 561.

4. The decision of the court below is such that it casts grave doubt upon questions of law which are of substantial importance in the administration of the revenue.

#### CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,  
Solicitor General.

APRIL 1938.



## APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner

but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

SEC. 277. (a) Except as provided in section 278—

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

SEC. 278. (d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Con-

gress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods,—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

**SEC. 281.** (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under subdivision (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under subdivision (a) or (b), notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

**SEC. 1109.** (a) Except as provided in sections 277, 278, 310, and 311—

(3) Where the assessment of any tax imposed by this Act or by prior Act of Con-



gress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (A) within six years after the assessment of the tax, or (B) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer (U. S. C., Title 26, Section 1432).

Revenue Act of 1928, c. 852, 45 Stat. 791:

## TITLE I. INCOME TAX

### SUBTITLE A. INTRODUCTORY PROVISIONS

#### SEC. 1. APPLICATION OF TITLE.

The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act.

#### SEC. 311. TRANSFERRED ASSETS.

(a) *Method of collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provi-

sions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees*.—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title.

(2) *Fiduciaries*.—The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) *Period of limitation*.—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) In the case of the liability of an initial transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the taxpayer;

(2) In the case of the liability of a transferee of a transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the preceding transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;

except that if before the expiration of the period of limitation for the assessment of

the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively,—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding.

(3) In the case of the liability of a fiduciary,—not later than one year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later.

\* \* \* \* \*

### TITLE III. AMENDMENTS TO 1926 INCOME TAX

#### SEC. 504. SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS.

(a) Section 277 (b) of the Revenue Act of 1926 is amended to read as follows:

“(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.”

(b) Subsection (a) of this section shall apply in all cases where the period of limi-

tation has not expired prior to the enactment of this Act.

**SEC. 505. SAME—TRANSFEE CASES.**

(a) Section 280 (d) of the Revenue Act of 1926 is amended to read as follows:

“(d) The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.”

(b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act.

**SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.**

(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

“(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

“(d) Where the assessment of any income, excess-profits, or war-profits taxes

imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."









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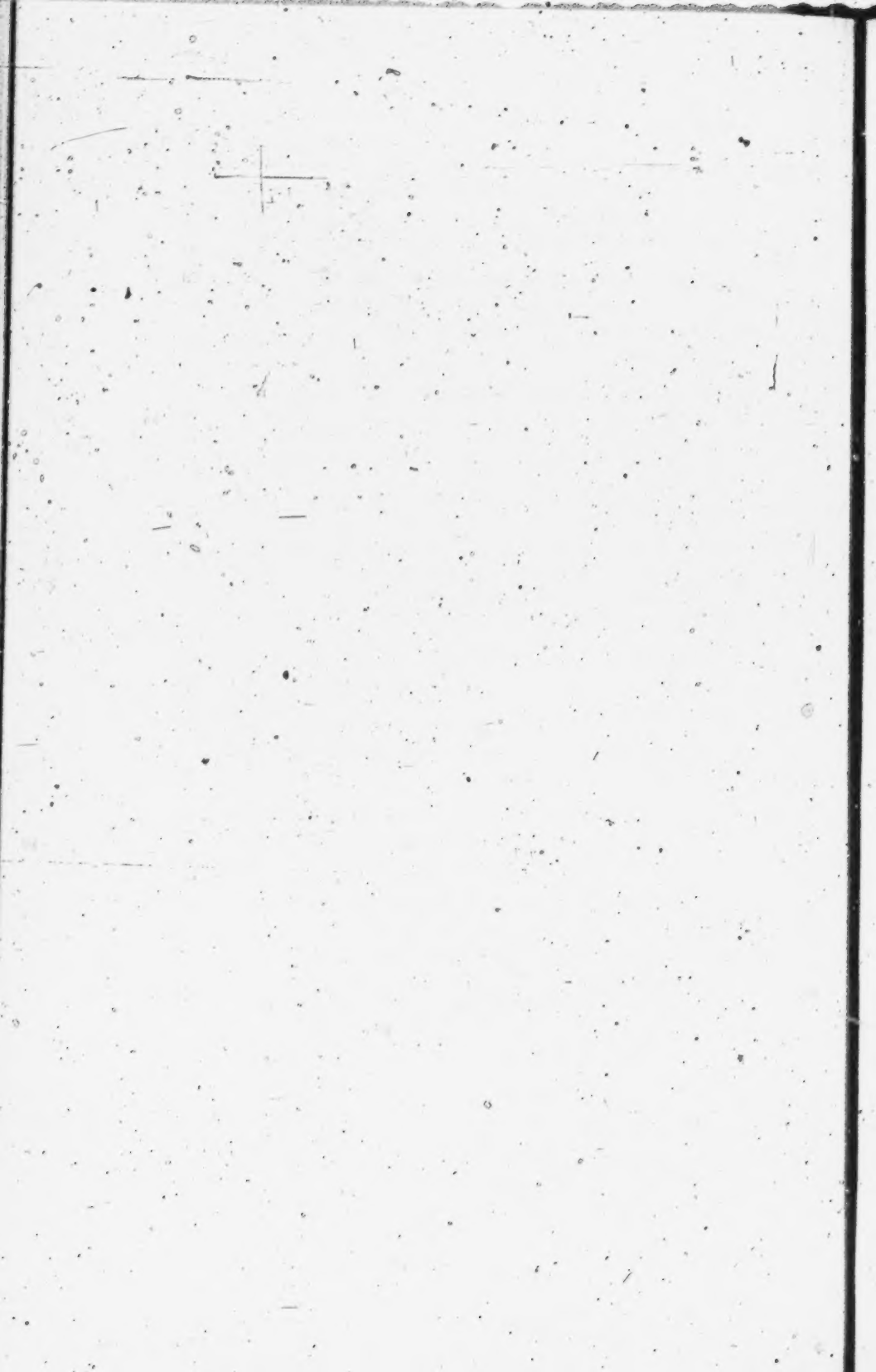
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# In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 22

THE UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
TRUSTEE UNDER THE LAST WILL AND TESTAMENT  
OF JAMES DUGGAN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

## OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 20-25) is reported at 94 F. (2d) 81. The District Court did not file a written opinion.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1938. (R. 26.) The petition for a writ of certiorari was filed April 5, 1938, and was granted May 16, 1938. (R. 26.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether the limitations period provided by Section 311 (b) (2) of the Revenue Act of 1928 is applicable in a proceeding to collect from transferees of a taxpayer the amount of their liability at law or in equity for unpaid Federal income and profits taxes due for the year 1920.

2. Whether this action was barred by any applicable provision of the Revenue Act of 1926.

#### STATUTES INVOLVED

The pertinent statutes involved are printed in the Appendix, *infra*, pp. 43-52.

#### STATEMENT

This is a suit in equity, brought by the petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, on May 6, 1932, against the Continental National Bank and Trust Company, as trustee under the will of James Duggan, deceased, to collect the sum of \$295,331.64, with interest as provided by law, representing the amount of the liability of James Duggan, deceased, for unpaid Federal income and profits taxes amounting to \$316,620.61 due from Johnston City & Big Muddy Coal & Mining Company, a dissolved Illinois corporation, for the calendar year 1920.

The other defendants named in the bill of complaint are beneficiaries of the testamentary trust created by the decedent.

The defendants moved to dismiss the petitioner's bill of complaint on the grounds that it failed to state a cause of action and that it was barred by the statute of limitations. The bar of the statute of limitations was alleged in particular to arise because of the provisions of Sections 278, 277, and 280 of the Revenue Act of 1926 and of Section 311 (b) of the Revenue Act of 1928 (R. 12-13). Before the defendants' motion to dismiss was acted upon by the District Court the petitioner's original bill of complaint (R. 1-11) was amended by leave of court (R. 13-15) to include the additional allegation of fact that on February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, in the sum of \$295,331.64 representing the amount redetermined by the Board of Tax Appeals as his liability for unpaid taxes due from the Johnston City & Big Muddy Coal & Mining Company. The defendants' motion to dismiss was thereupon renewed. (R. 14.) Briefs were thereafter submitted to the District Court by both parties but oral argument was not heard. On March 22, 1937, the District Court entered an order, without written opinion, dismissing the petitioner's bill of complaint. (R. 14, 16.) The order of dismissal was affirmed by the Circuit Court of Appeals for the



Seventh Circuit in an opinion filed January 5, 1938. (R. 20-25.)

The bill of complaint (R. 1-11), as amended (R. 13-15), shows that James Duggan, deceased, was during the years 1919 and 1920 the principal owner and stockholder of Johnston City & Big Muddy Coal & Mining Company, an Illinois corporation engaged in the business of mining and selling coal; and that the Johnston City & Big Muddy Coal & Mining Company owned a subsidiary corporation organized under the laws of Illinois and known as the Johnston City Coal Company. (R. 2-3.)

On May 16, 1921, the Johnston City & Big Muddy Coal & Mining Company filed a consolidated income and profits tax return for the calendar year 1920 which included the income and deductions of Johnston City Coal Company. A tax of \$5,269.21 shown thereon to be due was paid. (R. 3.)

Upon auditing the return filed by Johnston City & Big Muddy Coal & Mining Company for 1920 the Commissioner of Internal Revenue found that the income of the company had been greatly understated, and that there was due from the company an additional tax for 1920 in the sum of \$316,620.61. A statutory deficiency notice under Section 274 (a) of the Revenue Act of 1924 was mailed to the company under date of December 16, 1924, notifying it of this proposed deficiency. No ap-

peal from this notice was taken to the Board of Tax Appeals by the company. The amount of this deficiency was assessed against the company by the Commissioner on his January, 1925, list but no part of the assessment has ever been paid. (R. 3.)

During 1920 and 1921 the Johnston City & Big Muddy Coal & Mining Company was in process of liquidation. Its assets were converted into cash and commercial securities under the direction of James Duggan, and as a stockholder in the company he received and kept in his possession assets of the corporation to the amount of \$295,331.64 which were converted to his own use and purposes without payment or rendering value therefor in return, and without paying or discharging the obligation of the company to the Government of the United States for the unpaid income and profits taxes assessed against it for the year 1920. (R. 3.)

The Johnston City & Big Muddy Coal & Mining Company was dissolved December 29, 1921, and was left without assets available to pay the taxes assessed against it in January, 1925. Thereupon the Commissioner, by a registered letter dated April 15, 1926, notified James Duggan that under the provisions of Section 280 of the Revenue Act of 1926 there was proposed for assessment against him the sum of \$295,331.64, constituting his liability at law or in equity as a transferee of the assets of Johnston City & Big Muddy Coal & Min-

ing Company for the unpaid taxes assessed against the company. (R. 14-15.)

Upon receipt of this notice James Duggan filed an appeal with the United States Board of Tax Appeals, issue was joined, and the appeal came on for hearing in due course. On January 6, 1930, the Board promulgated its findings of fact and opinion. On January 27, 1931, it entered its decision in the appeal of James Duggan wherein his liability as transferee for income and profits taxes due from Johnston City & Big Muddy Coal & Mining Company for the year 1920 was fixed at \$295,331.64, with interest thereon as provided by law from December 6, 1924. No appeal was taken from the decision of the Board within the time provided by law and the decision became final six months thereafter. (R. 11, 14-15.) See 18 B. T. A. 608.

On February 14, 1931, the Commissioner of Internal Revenue made a jeopardy assessment against James Duggan, deceased, under authority of Section 279 of the Revenue Act of 1926 in the sum of \$404,992.73, representing the amount redetermined by the Board of Tax Appeals to be his liability as transferee of the assets of Johnston City & Big Muddy Coal & Mining Company, plus interest thereon in the sum of \$109,661.09. (R. 15.)

James Duggan died testate in March, 1929, leaving an estate worth approximately \$1,500,000 after payment of administration expenses and claims

other than the claim of the Government for the above \$295,331.64, plus interest. Michael Duggan, who was named executor in his will, had died previously and the Biscayne Trust Company of Miami, Florida, was duly appointed and qualified as executor. The Biscayne Trust Company became financially involved and was placed in the hands of a receiver, and was formally dismissed as such executor. Thereafter Lee C. Robinson was appointed and qualified as administrator d. b. n. c. t. a. on September 15, 1930. (R. 2, 5.)

Lee C. Robinson, while having actual notice and knowledge of the claim against James Duggan, deceased, distributed to Henry Duggan, one of the defendants named in the bill of complaint, the sum of \$50,000 pursuant to the terms of James Duggan's will, and distributed to the Continental National Bank & Trust Company, as testamentary trustee, all of the rest and residue of the estate of James Duggan, deceased. The Continental National Bank & Trust Company, as trustee under the will of James Duggan, now has in its possession the entire corpus of the estate of James Duggan distributed to it as such testamentary trustee. (R. 5.)

No part of the obligation of James Duggan, deceased, as established by the Board of Tax Appeals has ever been paid. (R. 15.)

In affirming the order of dismissal, the Circuit Court of Appeals held that the six-year period

provided by Section 278 (d) of the 1926 Act for collection, following a timely assessment, from the original taxpayer was not made applicable by Section 280 (a) of that Act to a proceeding, following a timely assessment, for collection from a transferee. (R. 24-25.) Apparently considering that the 1926 Act provided no limitations period for such proceedings, the court held that this hiatus had been filled by the Revenue Act of 1928. Applying Section 311 (b) (2) of that Act, it held that this suit was barred since it had not been brought within three years after expiration of the period for assessment against the original taxpayer.

**SPECIFICATION OF ERRORS TO BE URGED**

The court below erred:

1. In holding that this action was barred by the provisions of Section 311 (b) of the Revenue Act of 1928 at the time it was instituted, and in affirming the judgment of the District Court on that ground.
2. In holding that this action was barred by any applicable statute of limitations at the time it was instituted.
3. In failing to hold that this action was timely brought within the period of limitations properly applicable.
4. In affirming the judgment of the District Court dismissing this action.



## SUMMARY OF ARGUMENT

## I

This action was brought within the period provided by the applicable statute of limitations.

The 1920 income and profits tax return of Johnson City & Big Muddy Coal & Mining Company was filed May 16, 1921, and the Commissioner had five years from that date, or until May 16, 1926, within which to assess any additional tax against the company. Section 277 (a) (3) of the Revenue Act of 1926. The additional tax was timely assessed in January, 1925. The Treasury Department thereupon had six years, or until January, 1931, in which to collect the amount of the assessment, either from the Company or from its transferees. Section 278 (d) of the 1926 Act; *United States v. Updike*, 281 U. S. 489.

Instead of a proceeding in equity to enforce a transferee liability, the Commissioner adopted the alternative remedy of notice, assessment and collection against the transferee of the taxpayer. Section 280 of the 1926 Act. Under this section the applicable periods of limitation are those of the 1926 Act.

Under Section 280 (b) (1) the Commissioner had one year after expiration of the period for assessment against the Company in which to assess the liability of its transferees. On April 15, 1926, which was thirteen months and a day prior to the expiration of this latter period, the Commissioner

notified James Duggan that he proposed to assess a transferee liability against him for a part of the unpaid taxes of the Company. The Commissioner was prohibited from assessing this proposed liability for sixty days after this notice was sent. Section 274 (a) of the 1926 Act. During this sixty-day period, James Duggan filed an appeal with the Board of Tax Appeals. It was pending before the Board until the decision was entered on January 27, 1931. No appeal was taken and the decision became final on July 27, 1931. During this whole period, ~~and for sixty days thereafter, until September 25, 1931,~~ the Commissioner was prohibited from making an ordinary assessment. Section 274 (a) of the 1926 Act. The running of the period of limitation for assessing James Duggan was thus suspended during this period and for sixty days thereafter, or until September 25, 1931. Section 280 (d) of the 1926 Act, as amended. Since the period had thirteen months and a day to run when the deficiency notice was sent, the period for assessing James Duggan expired on October 26, 1932.

In fact, a jeopardy assessment against James Duggan was made on February 14, 1931. Since Section 280 contains no separate limitation on collection, the Government had six years from the date of the assessment, or until February 14, 1937, within which to collect the tax, either against James Duggan or his transferees. Section 238 (d). The bill of complaint, for recovery from the defendants, was filed against respondents on May 6, 1932.

The court below erred in refusing to apply the six-year period for collection to assessments made under Section 280, since subsection (a) plainly makes "the same provisions and limitations as in the case of a deficiency" of a taxpayer applicable to transferee assessments. But even if there must be collection within the assessment period, it has been shown that suit was commenced several months before this period expired.

This analysis does not mean, as the court below feared, that there would be a series of six-year periods in which to collect the tax from each successive transferee. The Commissioner has authority, as limited by Section 280 (b) (1), to make transferee assessments only during a period which is one year longer than the period in which to make taxpayer assessments (the running of the period being suspended under Section 280 (d) while he is prohibited from making assessments and for sixty days thereafter). The six-year collection period, of course, applies only to taxes which have been assessed in time.

## II

The court below held the action barred by the provisions of Section 311 (b) of the Revenue Act of 1928. In this the court erred. The provisions of Section 311 of the 1928 Act are, by the very language of the Act, made applicable only to taxes imposed under that Act for the taxable year 1928 and subsequent taxable years.

## III

The fact that James Duggan died during the pendency of the proceeding under Section 280 does not affect the suspension of the period for assessing against him the amount of his liability as a transferee of the taxpayer. The suspension of the period for assessment was effective regardless of whether or not the Board lost jurisdiction of the proceeding before it after his death. The fact that the transferee liability of James Duggan was assessed after his death is likewise immaterial. That assessment was sufficient in law to permit collection by a proceeding in court if brought within six years. This period is applicable regardless of whether the proceeding to collect was brought against him or against parties who had become liable in the meantime for the amount of the assessment.

That suit against the transferees of James Duggan could have been maintained, had the Commissioner known of the transfer, is immaterial. The period of limitation for assessment against James Duggan was suspended during the proceedings before the Board of Tax Appeals, and the statute gives six years after its assessment to collect the tax.

Respondents' argument that the possibility of a jeopardy assessment prevents suspension of the period for assessment during the Board proceedings is contradicted by the purpose and language

of the Act and the decisions of this and the lower courts.

#### IV

The testamentary trustee of the trust created by the will of James Duggan for the benefit of Henry Duggan is not removed from this proceeding by the death of Henry Duggan. Nor does the death of Henry Duggan relieve the trustee of that trust of its liability for the amount of the Government's claim.

#### ARGUMENT

##### I

#### THE INSTANT SUIT WAS TIMELY UNDER APPLICABLE PROVISIONS OF LAW

The bill of complaint alleges that defendants received property from the estate of James Duggan, deceased, impressed with a trust in favor of the United States for unpaid income and profits taxes due for 1920 from Johnston City & Big Muddy Coal & Mining Company. So far as here material, the motion to dismiss raised only questions of the statute of limitations.<sup>1</sup> It is clear, we submit, that

<sup>1</sup> The motion to dismiss was also based upon the ground that the bill of complaint failed to allege facts sufficient to constitute a good cause of action against them, or any of them (R. 12-13). This ground was not urged below, and was not discussed in the defendants' brief in opposition to the petition for a writ of certiorari, and need not be considered here.



this action was not l...red at the time it was instituted

1. The facts material to this question may briefly be restated. The Johnston City & Big Muddy Coal & Mining Company filed its consolidated income and profits tax return for the calendar year 1920 on May 16, 1921, and paid the amount shown thereon to be due (R. 3). In January, 1925, the Commissioner, after notice under Section 274 (a) of the Revenue Act of 1926, assessed an additional tax of \$316,620.61 against the company, but the tax could not be collected from the company, which had distributed its assets in liquidation and had been dissolved in 1921 (R. 3, 4). The Commissioner on April 15, 1926, notified James Duggan by registered mail, pursuant to Section 280 of the Revenue Act of 1926, that he proposed to assess against him the sum of \$295,331.64, constituting his liability as a transferee for income and profits taxes due from the company for the year 1920 (R. 4). Upon receipt of this notice James Duggan appealed to the United States Board of Tax Appeals for a redetermination of his liability (R. 4, 14-15). In due course a hearing was had before the Board of Tax Appeals, and after full consideration the Board, on January 27, 1931, entered its decision affirming the determination of the Commissioner and fixing the liability of James Duggan as such transferee in the sum of \$295,331.64 with

interest thereon as provided by law from December 6, 1924 (R. 4, 11, 14-15). On February 14, 1931, the Commissioner made a jeopardy assessment against James Duggan in the sum of \$404,992.73, being the above amount of \$295,331.64 plus interest thereon in the sum of \$109,661.09 (R. 15). James Duggan having died in the meantime, and his estate having been administered, there remained no assets in the hands of his legal representatives from which the amount of this assessment could be collected. Compare *Hulburd v. Commissioner*, 296 U. S. 300. This action was thereupon instituted, on May 6, 1932, against the defendants, who had received the assets of his estate, to recover from the assets of James Duggan in their hands the amount assessed against him on February 14, 1931, as his liability for unpaid taxes due from Johnston City & Big Muddy Coal & Mining Company, with interest thereon as provided by law.

The 1920 income and profits tax return of Johnston City & Big Muddy Coal & Mining Company was filed May 16, 1921, and the Commissioner had five years from that date, or until May 16, 1926, within which to assess any additional tax against the company. Section 277 (a) (3) of the Revenue Act of 1926, *infra*. The additional tax of \$316,620.61 was timely assessed against the taxpayer corporation in January, 1925.

Under Section 278 (d) of the Revenue Act of 1926,<sup>2</sup> *infra*, the Treasury Department had six years from the date of assessment within which to collect the amount of that assessment.<sup>3</sup> Compare *Florsheim Bros Co. v. United States*, 280 U. S. 453, 467-468. *Welch Ins. Agency v. Brast*, 55 F. (2d) 60, 62 (C. C. A. 4th), certiorari denied, 285 U. S. 355; *Motter v. Garrison*, 43 F. (2d) 34 (C. C. A. 10th); *Heffernan v. Alexander*, 48 F. (2d) 855, 858-859 (W. D. Okla.). This period for collection after assessment is equally applicable where a suit at law or in equity is brought against transferees of the taxpayer to collect the amount of the assessment against it. *United States v. Updike*, 281 U. S. 489; *United States v. Crook*, 18 F. (2d) 449 (C. C. A. 5th), certiorari denied, 275 U. S. 532.

The Government could have enforced the transferee liability of James Duggan at any time during this six-year period, expiring in January, 1931, by an appropriate action in equity. However, this remedy for the enforcement of James Duggan's liability was not adopted. Instead, the Commissioner adopted the new remedy authorized by Sec-

<sup>2</sup> That section was amended by Section 506 (a) of the Revenue Act of 1928, *infra*, in a manner not material here.

<sup>3</sup> The limitation in Section 278 (e) of the Revenue Act of 1926, *infra*, is inapplicable here. That provision excepts from Section 278 (d) such proceedings where the assessment, distraint, or collection in court was barred at the time of enactment, February 26, 1926. This was not the case here. See Sections 278 (d) and (e) of the Revenue Act of 1924 and Section 250 (d) of the Revenue Act of 1921.

tion 280 of the Revenue Act of 1926, *infra*, and the question of limitation now before this Court is to be determined in accordance with the provisions of law which are applicable to cases in which the latter remedy is adopted.

2. As this Court said in *Phillips v. Commissioner*, 283 U. S. 589, 592, stockholders who have received the assets of a dissolved corporation may be compelled, "in an appropriate proceeding", to discharge unpaid corporate taxes, but that "before the enactment of § 280 (a) (1), such payment by the stockholders could be enforced only by bill in equity or action at law." Since the enactment of Section 280 of the 1926 Act, however, the "liability of the transferee for such taxes may be enforced in the same manner as that of any delinquent taxpayer", and "the procedure prescribed for collection of the tax from a stockholder is thus the same as that now followed when payment is sought directly from the corporate taxpayer." See also *Hulburd v. Commissioner*, 296 U. S. 300, 303.

The new remedy is not exclusive, but is in addition to proceedings to enforce a tax lien, or an action at law or in equity. *United States v. Greenfield Tap & Die Corp.*, 27 F. (2d) 933 (Mass.); *United States v. Updike*, 25 F. (2d) 746, 747 (Neb.), affirmed, 32 F. (2d) 1, 4 (C. C. A. 8th), and 281 U. S. 489; *Phillips v. Commissioner*, *supra*, 593-594, note 3; *Hulburd v. Commissioner*, *supra*, 303.

In the instant case the Commissioner proceeded under Section 280 of the 1926 Act to enforce the transferee liability of James Duggan (R. 4). Under subsection (a) of that section his liability, except as otherwise provided in the section, is to be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax" imposed by Title II of the 1926 Act, "including \* \* \* the provisions authorizing distraint and proceedings in court for collection." Accordingly, the questions of limitation raised by the motion to dismiss are governed by the provisions of the Revenue Act of 1926 (some of which were amended by the Revenue Act of 1928). *United States v. Updike*, 281 U. S. 489, 493-494; *Helvering v. Newport Co.*, 291 U. S. 485, 487.

3. Section 280 (a) provides that the liability of a transferee shall, "except as hereinafter in this section provided" be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in income taxes imposed by the Act. This section makes applicable the provisions of Section 274 of the Revenue Act of 1926, *infra*. Subsection (a) of the latter section provides for formal notice of deficiency (or of liability at law or in equity in the case of transferees and fiduciaries); authorizes appeal to the Board of Tax Appeals; and, except as otherwise specifically provided, prohibits any assessment, or any distraint or proceeding in court



for collection, until after the appeal period has expired, or if an appeal is filed, until the decision of the Board has become final.

Since the period for assessment against the Johnston City & Big Muddy Coal & Mining Company did not expire until May 16, 1926, which was after the enactment of the Revenue Act of 1926, the proper period within which the liability of a transferee of the taxpayer may be assessed is that contained in Section 280 (b) (1), which provides that such liability may be assessed within one year after the expiration of the period of limitation for assessment against the taxpayer.<sup>4</sup> The Commissioner therefore had until May 16, 1927, within which to assess the transferee liability of James Duggan.

On April 15, 1926, which was one year, one month, and one day prior to the expiration of the period of limitation for assessment of the transferee liability of James Duggan, the Commissioner mailed a statutory notice to him pursuant to Section 280 (a), proposing to assess against him the sum of \$295,331.64, representing his liability as a transferee for unpaid income and profits taxes due from Johnston City & Big Muddy Coal & Mining

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<sup>4</sup> Had the period for assessment against the taxpayer expired before the enactment of the Revenue Act of 1926, the period of limitation for assessment against transferees would be governed by Section 280 (b) (2), *infra*.

The fact that the corporate taxpayer had been dissolved does not affect this period for assessment against the transferee. See Section 280 (c) of the Revenue Act of 1926, *infra*.

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Company for the year 1920 (R. 4). This notice under Section 280 (d)<sup>3</sup> had the effect of suspending the period of limitation for assessment against James Duggan for a period of sixty days, during which period the Treasury Department was prohibited by Section 274 (a), *infra*, from assessing the tax or attempting to collect it from him.

On June 11, 1926, which was prior to the expiration of this sixty day period, James Duggan filed an appeal with the United States Board of Tax Appeals (R. 4, 14). That appeal remained on the Board's docket until disposed of by a final decision entered January 27, 1931 (R. 4, 11, 14-15).<sup>4</sup> During the time this appeal was pending before the Board, the Commissioner was prohibited by Section 274 (a) from assessing the liability involved,<sup>5</sup> and under Section 280 (d), as amended, the period for making the assessment against him was suspended from the date the notice under Section 280 was mailed to him until the Board's decision became final, and for sixty days thereafter.<sup>6</sup>

<sup>3</sup> Amended by Section 505 (a) of the Revenue Act of 1928, *infra*.

<sup>4</sup> This decision was entered pursuant to the findings of fact and opinion of the Board promulgated January 6, 1930, reported at 18 B. T. A. 608. See also 21 B. T. A. 740.

<sup>5</sup> Except as otherwise specifically authorized by that section, including, *inter alia*, jeopardy assessments under Section 279 (a).

<sup>6</sup> See *Brown & Sons Co. v. Burnet*, 282 U. S. 283; *Mutual Lumber Co. v. Poe*, 66 F. (2d) 904 (C. C. A. 9th), certiorari denied, 290 U. S. 706; *American Equitable Assur. Co. of*

No appeal was taken from the Board's decision within the time permitted by Section 1001 (a) of the 1926 Act and the decision became final on July 27, 1931. Section 1005 (a) of the 1926 Act. The period for assessment against James Duggan was therefore extended by Section 280 (d), as amended, at the least until September 25, 1931, sixty days after the decision became final. And, since the statute provides for the suspension of the running of the period, rather than its extension to a given date, the period for assessment of James Duggan's transferee liability was extended one year, one month, and one day (the number of days remaining of the period for such assessment when the notice of April 15, 1926, was mailed) from September 25, 1931, or until October 26, 1932. *Continental Oil Co. v. United States*, 14 F. Supp. 533, 539-540, certiorari dismissed as premature, 293 U. S. 510; *Olds & Whipple v. United States*, 22 F. Supp. 809, 815-816. The Commissioner made a jeopardy assessment of the liability of James Duggan under authority of Section 279 (a) of the 1926 Act on February 14, 1931 (R. 15). This was long prior to the expiration of the period of limitation for assessment.

*New York v. Helvering*, 68 F. (2d) 46 (C. C. A. 2d); *USL Battery Corp. v. Commissioner*, 32 B. T. A. 810, affirmed, 84 F. (2d) 1020 (C. C. A. 2d), certiorari denied, 299 U. S. 593; *Atlas Plaster & Fuel Co. v. Commissioner*, 55 F. (2d) 802 (C. C. A. 6th); *Parker v. Commissioner*, 30 B. T. A. 342, affirmed on other grounds, 84 F. (2d) 838 (C. C. A. 8th); *Olympic Refining Co. v. Commissioner*, 32 B. T. A. 1056.

Section 280 of the 1926 Act does not provide a separate period of limitation for *collection* of the liability of a transferee after it has been assessed. Instead, it provides that such liability shall be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations" as in the case of a deficiency in income taxes. It thus makes applicable the period of limitation upon collection which is specified in Section 278 (d) of the Act. See *United States v. Updike*, 281 U. S. 489, 494; *City Nat. Bank v. Commissioner*, 55 F. (2d) 1073 (C. C. A. 5th), certiorari denied, 286 U. S. 561. The Government therefore had six years from the date of assessment of the liability of James Duggan, or until February 14, 1937, within which to collect the tax, either by distraint or by a proceeding in court.\* The bill of complaint was filed May 6, 1932.

4. In its opinion the court below correctly pointed out that the limitation provisions contained in subdivision (b) of Section 280 of the 1926 Act "have to do only with assessment, not with collection", but it erroneously concluded that "it was not intended that the six-year provision of section 278 should be read into it" (R. 24). This is contrary to the plain language of the statute and the

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\* This period applies whether the assessed tax was to be collected from James Duggan or by a suit in equity to attach liability to his transferees. *United States v. Updike*, *supra*; *United States v. Crook*, *supra*.



decisions discussed above. And, it may be noted, if the court were correct it would mean that there is no separate period of limitations upon collection after assessment of a transferee liability, and the Treasury Department would be required to collect from a transferee prior to the expiration of the period of assessment against him. It is hardly to be thought that Congress would meticulously prescribe a period of limitation for assessment, and yet remain silent as to the period for collection. Compare *Bowers v. N. Y. & Albany Co.*, 273 U. S. 346. But, even under this theory of the court below, the present action was timely. Under the decisions of the Court of Claims in *Continental Oil Co. v. United States* and *Olds & Whipple v. United States*, *supra*, the period for assessing the liability of James Duggan, or for collecting without assessment, did not expire until October 26, 1932, its running being suspended from the date of the deficiency notice until sixty days after the date the Board's decision became final. The present action was brought on May 6, 1932.

We agree with the court below "that Congress did not intend to allow a six-year period of limitation for the collection of each successive transfer of the liability of the original tax" (R. 24). The statute makes no such provision. Section 277 of the Act provides generally that the amount of the tax shall be assessed within the period specified, and Section 278 (d) provides that where the amount of the tax has been assessed within the

time prescribed it may be collected by distraint or by a proceeding in court if begun within six years after the date of the assessment. This period for collection by distraint or by a proceeding in court is applicable regardless of whether the proceeding is against the taxpayer, or a transferee of the taxpayer, or some subsequent transferee. *United States v. Updike, supra*; *United States v. Crook, supra*. However, if the Commissioner elects to proceed against transferees in accordance with Section 280 he has an entirely different period—that specified in subsection (b)—within which to assess the liability of transferees. In a proceeding under Section 280 it is entirely immaterial whether or not an assessment was made against the taxpayer. The period for assessment against transferees runs from the date of expiration of the statutory period for assessment against the taxpayer and not from the date the assessment was in fact made against him. *Commissioner v. Gerard*, 78 F. (2d) 485 (C. C. A. 9th); *City Nat. Bank v. Commissioner*, 55 F. (2d) 1073 (C. C. A. 5th); *Puget Sound National Bank of Tacoma v. Commissioner*, 36 B. T. A. 386. In *Goldwater v. Commissioner*, 21 B. T. A. 73, involving substantially similar facts, the Board said (pp. 75-76): “The fact that assessment was made against the corporation in January, 1925, would affect only the period for the collection of such tax from the corporation and would not alter the period for assessment [against transferees].”

The Commissioner thus has only one period under the 1926 Act for assessment against transferees. The period specified in Section 280 (b) is applicable regardless of whether the Commissioner asserts a liability against the initial transferee or against subsequent transferees. Compare *Hulburd v. Commissioner*, 296 U. S. 300, 304. After a transferee liability has been asserted under Section 280, *supra*, and a timely assessment has been made, there are six years from the date of the assessment within which to collect by distraint or by a proceeding in court. As in the case of a proceeding in court to collect a timely assessment against a taxpayer, this six-year period for collection after assessment against a transferee is applicable regardless of whether the proceeding in court is brought against the transferee whose liability was asserted under Section 280 or against a subsequent transferee who has in the meantime become liable for the amount assessed.

We submit that under a proper construction of the applicable provisions of law the present action was timely.

## II

THIS PROCEEDING IS NOT BARRED BY SECTION 311 (B) OF  
THE REVENUE ACT OF 1928

Except as indicated in the preceding section of this brief, the court below did not take direct issue

with that analysis of the provisions of the Revenue Act of 1926. It held, instead, that the action was barred by the provisions of Section 311 (b) of the Revenue Act of 1928. In so holding the court clearly was in error.

Section 311 (b) of the Revenue Act of 1928 is included in Title I of that Act. Section 1 of the Act specifically states that the provisions of Title I "shall apply only to the taxable year 1928 and succeeding taxable years". It further states that income and profits taxes "for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act."

If more were needed, the application of Section 311 of the 1928 Act is by its terms expressly limited to liability for taxes imposed by that Act. Subsection (a) of Section 311, *supra*, prescribes a method for collection of the "liability, at law or in equity, of a transferee of property of a taxpayer, *in respect of the tax \* \* \* imposed upon the taxpayer by this title*", and also of the liability of a fiduciary under Section 3467 of the Revised Statutes "in respect of the payment of *any such tax from the estate of the taxpayer*." Subsection (b) of Section 311 prescribes the period, or periods,

within which "*any such liability*" must be assessed. [*Italics ours.*]<sup>10</sup>

It is clear, we submit, that the statute relied upon by the court below is by its express terms inapplicable to the instant proceeding. The Board of Tax Appeals reached the same conclusion in *Hoosac Mills Corp. v. Commissioner*, 29 B. T. A. 1057, reversed on another issue, 75 F. (2d) 462 (C. C. A. 1st).

### III

THE ARGUMENTS ADVANCED BY RESPONDENTS IN SUPPORT OF THEIR MOTION TO DISMISS DO NOT JUSTIFY THE DECISION BELOW

Several arguments, all revolving around the death of James Duggan during the pendency of his appeal to the Board of Tax Appeals, were advanced below by the defendants in support of their motion to dismiss and in opposition to the granting of a

<sup>10</sup> Paragraph (1) prescribes the period for assessment of the liability of an initial transferee, paragraph (2) provides an additional period for assessment of the liability of a transferee of a transferee (with an exception applicable to both), and paragraph (3) prescribes an entirely different period for assessment against a fiduciary.

The provision of an additional period for *assessment* against a transferee of a transferee is new in the 1928 Act, whereas under the 1926 Act there was only one period for assessing the liability of a transferee, whether the initial transferee or a subsequent transferee. It represents an enlargement of the period within which the Commissioner might *assess* in the case of succeeding transfers.



writ of certiorari.<sup>11</sup> These arguments were not dealt with fully by the court below because of the ground upon which its decision was based. We submit they do not support the decision below.

1. Respondents argued in their brief in opposition to the petition for a writ of certiorari that "the period of limitation for suit against the corporation in this case had expired either in May, 1926 [five years after the return was filed], or in January, 1931 [six years after the assessment was made against the corporation in 1925]. Therefore, suit against this respondent as a transferee was barred before this suit was begun in 1932." (Br. 7.)

This argument completely ignores the intervening proceeding under Section 280 of the Revenue Act of 1926 to determine the transferee liability of James Duggan, and the effect which that proceed-

<sup>11</sup> As set out in an opinion of the Board, the case was heard on December 10, 1928. Briefs were filed, and oral argument was had on March 7, 1929. Counsel for Duggan filed a suggestion of his death on April 9, 1929. The Board's report was promulgated on January 6, 1930. The Biscayne Trust Company, as executor, was substituted on January 21, 1930. The order was vacated, after argument by opposing counsel, on April 14, 1930, and an order to show cause why it should not be substituted was issued on April 28, 1930. Return was made and argument had. On September 20, 1930, counsel for the Trust Company filed a suggestion that it had suspended operations in June, 1930, and that Lee C. Robinson was acting as Administrator of Duggan's estate. On December 16, 1930, the Board directed that notices under Rule 50 be sent to Duggan, the Trust Company, and Robinson. 21 B. T. A. 740.

ing had in so far as the periods for assessment and collection of the transferee liability are concerned. That proceeding, as has been fully demonstrated above, served to suspend the period in which to assess the liability of James Duggan, and to make the period of limitation for collection of the tax six years from the date of that assessment.

It is obvious, we submit, that if this argument were sustained it would defeat the intention of Congress to allow the Government sufficient time for collection of a transferee liability where a proceeding for determination of that liability has been timely begun under Section 280, and might offer a ready means of defeating its collection entirely. It seems unthinkable that the death of James Duggan and the opportune distribution of his estate, with full knowledge of his liability to the Government, could be used to avoid provisions of law which would otherwise afford ample opportunity for the collection of that liability. If the defendants' contention in this respect were sound, it might be that any transferee, either individual or corporate, after receiving a statutory notice under Section 280, could appeal to the Board of Tax Appeals, thus preventing the Government from proceeding against him for collection, and, after expiration of the statutory period for suit against the original taxpayer, could dispose of his property to another in such a way that the liability for the tax would be shifted and the Government left without a remedy for collection.

The defendants' argument finds no support in *United States v. Updike*, 281 U. S. 489. In that case there had been no intervening proceeding under Section 280 of the 1926 Act prior to the institution of the proceeding in court for collection. The case involved income and profits taxes under the Revenue Act of 1917 for the period in 1917 prior to dissolution of the corporate taxpayer. No return under the 1917 Act had been filed by the corporation for the period involved, but in October, 1918, a revenue agent examined the books of the corporation and made a return in regular form which presumably was sufficient to start the running of the statutory period for assessment and for collection by distraint or proceeding in court.<sup>12</sup> The additional tax shown by this return to be due for the period involved was assessed against the corporation in January, 1920.<sup>13</sup> The suit against

<sup>12</sup> See Section 250 (d) of the Revenue Acts of 1918 and 1921; Sections 277 (a) (2) and 278 (d) of the Revenue Act of 1924; Sections 277 (a) (3) and 278 (d) of the Revenue Act of 1926.

<sup>13</sup> The period for instituting a proceeding in court to collect the 1920 assessment, and presumably the period for making a new assessment against the corporation, had both expired before the Revenue Act of 1926 was approved and a notice under Section 280 (a) thereof could not have thereafter been sent to the transferees within the periods permitted by Section 280 (b). This was immaterial to the question there at issue, however, since no such notice was given and no appeal was filed with the Board of Tax Appeals.

transferees to collect the amount of the assessment was brought in 1927, more than seven years after the assessment was made. The only question considered by this Court was whether the suit was barred by the six-year limitation provision contained in Section 278 (d). The Government argued that the provision related only to suits against taxpayers to collect taxes *qua* taxes, and not to suits to collect from transferees. The Court held, however, that the suit was one to collect a liability for taxes assessed, and that because of the provision of Section 280 (a) the period was intended to apply as well to suits to collect from transferees. The decision is clear authority for the petitioner's position in this case that Section 280 (a) makes applicable the provisions of Section 278 (d) to a proceeding for collection of a timely assessment against a transferee. But it is no authority whatever for ignoring a timely assessment against a transferee, or for ignoring the effect of a proceeding against a transferee under Section 280, when the proceeding for collection must be brought against others who have become liable during the pendency of the proceeding under Section 280.

2. It has been insisted that because of the death of James Duggan and the failure to substitute his legal representatives the proceeding before the Board abated and the Board was without jurisdiction to enter its decision of January 27, 1931. This

argument, right or wrong,<sup>14</sup> is no answer. The Board undeniably obtained jurisdiction upon the filing of the appeal. Whether it retained jurisdiction has no bearing upon the question whether the period for assessment against James Duggan was suspended by Section 280 (d) of the 1926 Act, as amended by Section 505 (a) of the 1928 Act. Even if the appeal had been filed too late, or if for some other reason the Board had never acquired jurisdiction in the first place, the period for assessment would still have been suspended. See *American Equitable Assur. Co. of New York v. Helvering*, 68 F. (2d) 46 (C. C. A. 2d); *USL Battery Corp. v. Commissioner*, 32 B. T. A. 810, affirmed, 84 F. (2d) 1020 (C. C. A. 2d), certiorari denied, 299 U. S. 593;

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<sup>14</sup> The Board held that it had jurisdiction. 21 B. T. A. 740. Its decision on that question was appealable. *Liberman's Committee v. Commissioner*, 54 F. (2d) 527 (C. C. A. 2d). The legal representatives had notice of the proceeding, and their right to appear and prosecute the appeal cannot be denied. See Rule No. 37 of the Board's Rules of Practice; *Rusk v. Commissioner*, 53 F. (2d) 428 (C. C. A. 7th). Instead of taking the necessary steps to protect the interest of the estate they refused to be substituted and allowed the Board's decision to become final, in the meantime distributing the assets of the estate. Under such circumstances it is doubtful whether the decision on the question of jurisdiction can be attacked collaterally in this proceeding. See *Sargeant v. The State Bank of Indiana*, 12 How. 371, 384-385; *White v. Crow*, 110 U. S. 183; *Toy Toy v. Hopkins*, 212 U. S. 542; *Hartford Life Ins. Co. v. Johnson*, 268 Fed. 30 (C. C. A. 8th), appeal dismissed, 258 U. S. 612; *Garcin v. Commissioner*, 22 B. T. A. 1027, 1038-1039, remanded per stipulation, 79 F. (2d) 993 (C. C. A. 4th).



*Parker v. Commissioner*, 30 B. T. A. 342, affirmed on other grounds, 84 F. (2d) 838 (C. C. A. 8th); *Olympic Refining Co. v. Commissioner*, 32 B. T. A. 1056. See also H. Rep. No. 2, 70th Cong., 1st Sess., pp. 23, 28; S. Rep. No. 960, 70th Cong., 1st Sess., pp. 31, 36. The court below indicated its concurrence in this, but found it immaterial because of the ground upon which its decision was based. (R. 25.)

The question of validity of the decision entered by the Board of Tax Appeals may be important in the determination of this case on its merits, but it clearly has no bearing upon the question under review. If the decision is valid, or if it is not subject to collateral attack in this proceeding, the matters therein contained are *res judicata*. If void for want of jurisdiction the matters there sought to be adjudicated may be heard *de novo*.

3. It was also argued below, and suggested in the brief in opposition to the petition for certiorari (pp. 6, 10-11), that the assessment made against James Duggan on February 14, 1931, is insufficient to permit a proceeding for collection to be brought within six years because it was based upon an *ex parte* decision of the Board, and because it was made after James Duggan's death. Neither reason is sufficient.

Even if the Board were without jurisdiction, the Commissioner's determination of James Duggan's transferee liability was *prima facie* correct, and upon dismissal of the appeal he would have had

authority to make the assessment within the time permitted by statute.

The fact that the assessment was made after James Duggan's death is immaterial. The making of an assessment is an administrative act. It does not constitute the commencement of a judicial proceeding, but is in substance only an official entry of the Commissioner's determination, and neither notice to nor the existence of the taxpayer at the time is necessary to its validity.<sup>15</sup> The reports of the Board of Tax Appeals and the courts are filled with cases in which the assessment was made after the death or dissolution of the taxpayer. In *United States v. Updike*, 281 U. S. 489,

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<sup>15</sup> The revenue acts do not prescribe the method of making an assessment. By Section 3182 of the Revised Statutes (U. S. C., Title 26, Secs. 1530-1533) the Commissioner is authorized and required to make the necessary inquiries, determinations, and assessments of taxes and penalties, and when it is found that there is any error resulting from omission, understatement, undervaluation, or false or fraudulent statement contained in any return made by any person liable to tax the Commissioner may, at any time within the period prescribed for making an assessment, enter on any monthly or special list the name of the person liable and the amount for which he is liable. The list is then to be certified to the proper collector of internal revenue whose duty it is to collect the amount assessed. See, also, Revised Statutes, Section 3447 (U. S. C., Title 26, Secs. 1534, 1542, 1691). The language of the statute indicates that the name of the person liable and the amount of the liability are to be listed for the information of the collector, and there is nothing to indicate that the making of the assessment is a nullity if the taxpayer is dead, or, in the case of a corporation, is dissolved,

the assessment had been made after dissolution of the corporation and this Court held that it was sufficient to prevent collection by a proceeding in court instituted more than six years later. In *United States v. Crook*, 18 F. (2d) 449 (C. C. A. 5th), certiorari denied, 275 U. S. 532, the court held that an assessment made against the corporation after its dissolution was sufficient to permit collection by a proceeding in court brought within six years. In each of the few cases we have found in which the validity of an assessment has been questioned on the ground that it was made after the death or dissolution of the taxpayer the question has been decided adversely to the contention of the defendants. *Muir v. United States*, 3 F. Supp. 619 (C. Cls.); *Anderson v. United States*, 15 F. Supp. 216 (C. Cls.), certiorari denied, 300 U. S. 675; *Anderson v. United States*, 15 F. Supp. 225 (C. Cls.); *Anderson v. Bass*, 88 F. (2d) 185 (C. C. A. 5th). In the instant case the defendants, although challenging the validity of the assessment against James Duggan after his death, rely on the validity of the assessment made against the corporation several years after its dissolution.

4. In their brief in opposition to the petition for certiorari the defendants asserted that the proceeding before the Board "did not suspend the right to bring a suit against the respondent as a transferee of the coal company," and that "a suit could have been commenced against it before the

entry of what petitioner claims was the final order in the Board proceeding." (Br. 10.) This statement is only partly true. The defendants were not transferees of the coal company, and were not liable for the amount involved until the assets of James Duggan's estate were distributed to them. The Government probably could have proceeded against them immediately after the transfer and while the Board proceeding was still pending, but it would be a harsh rule which would require the Treasury to post guard over every taxpayer appealing to the Board of Tax Appeals in order to protect its rights in case of an unexpected or surreptitious disposition of assets pending determination of the appeal.

5. Respondents have also developed an argument to the effect that, if a jeopardy assessment can be made at any time during the pendency of an appeal to the Board, "then it is nonsense to claim that there is any suspension of the period for assessment". (Brief in Opp., p. 11.) The argument is completely answered by the Circuit Court of Appeals for the Ninth Circuit in *Mutual Lumber Co. v. Poe*, 66 F. (2d) 904, 907-908, certiorari denied, 290 U. S. 706. See *Brown & Sons Co. v. Burnet*, 282 U. S. 283, 288-294.<sup>18</sup> The Commissioner is authorized to send a notice under Section 274 (a), *supra*, and is thereafter prohibited from making an

<sup>18</sup> Compare, also, the other cases cited in footnote 8, *supra*.

assessment or attempting to collect during the period specified, "except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001". There is nothing in the Act or in its legislative history to justify the conclusion that Congress intended to nullify the general provisions suspending the period for assessment during the pendency of an appeal by permitting an immediate assessment under certain circumstances, irrespective of the general prohibition against ordinary assessment; where to delay assessment might jeopardize the revenue. Congress apparently intended that the suspension of the assessment period should be effective until the Board's decision in a case becomes final, even though it relaxed the prohibition against assessment sufficiently to permit him to act in cases of jeopardy to the revenue. In any event, the prohibition against assessment, and therefore the suspension of the period for assessment, were plainly effective in this case until the Commissioner made the jeopardy assessment against James Duggan, and even if respondents intend to suggest that the suspension of the statute of limitations was halted when the jeopardy assessment was made (See Br. in Opp. 11-12), it does not help their case. The assessment and suit would yet be timely.<sup>17</sup>

<sup>17</sup> The assessment period, of course, does not terminate when the assessment is made. Thus, even if there should be thought not to be a six-year collection period after the



## IV

THE TESTAMENTARY TRUSTEE IS STILL A PARTY TO THIS PROCEEDING IN ITS FIDUCIARY CAPACITY

The brief filed with this Court in opposition to the petition for certiorari suggested the death of Henry Duggan on October 16, 1937,<sup>18</sup> and urged that his death "removed him and the trust for his benefit from the case". (Br. 1.) It is also argued that "there is no means by which the persons whose interests in the trust property vested on Henry Duggan's death" can be brought into this proceeding; that this bill does not reach them; and that as to the trustee of the residuary estate of James Duggan, "the cause of action was against the trust company solely as trustee and necessarily terminated with the termination of the trust and with the trust company's ceasing to be a trustee thereof". (Br. 1-2.) Counsel therefore sought to limit their appearance in this Court to the representation of the Continental National Bank & Trust Company as trustee under the \$50,000 trust created by paragraphs 3 and 4 of James Duggan's

assessment was made, and even if the jeopardy assessment of February 14, 1931, terminated the suspension of the running of the assessment period, there was an unexpired period of thirteen months and one day, plus the sixty days given under Section 280 (d), or until May 15, 1932, in which to assess and collect.

<sup>18</sup> This was two weeks prior to the date on which the case was argued before the Circuit Court of Appeals (R. 20), but neither the court nor counsel for the Government was so advised at that time.

will. (R. 7-8.) The argument thus advanced does not merit the attention of this Court.

The death of Henry Duggan has no bearing whatever upon the right of this Court to hear and determine the questions at issue. Neither does it remove from the case the Continental National Bank & Trust Company as trustee of the residuary trust created by paragraphs 6 and 7 of James Duggan's will.

James Duggan received property of the original taxpayer impressed with a trust in favor of the United States for unpaid income and profits taxes. To the extent of the Government's claim, therefore, he held such assets as a trustee. Before that trust was discharged the assets of his estate were distributed to the defendants in accordance with the terms of his will. But they were still impressed with that trust, and to that extent the defendants succeeded James Duggan as trustees holding property impressed with a trust in favor of the Government. Compare *Hallett v. Collins*, 10 How. 174; *Allen v. St. Louis Bank*, 120 U. S. 20, 40; *Union Pacific Railway Co. v. McAlpine*, 129 U. S. 305, 314; *Albright v. Oyster*, 140 U. S. 493, 512-513; *United States v. Dunn*, 268 U. S. 121, 132. The fact that the trust in favor of the United States is a constructive trust does not alter the situation. The courts fully recognize that several trusts can exist in a single fund. See *U. S. Trust Co. v. Commissioner*, 296 U. S. 481, 487. And the

standard of duty of a trustee is no different where the trust to be enforced is a constructive trust rather than an express trust. *Buffum v. Barceloux Co.*, 289 U. S. 227, 237.

The Continental National Bank & Trust Company is properly before the Court, both in its capacity as trustee of the trust created for the benefit of Timothy Duggan and his children and in the capacity as trustee of the residuary trust created for the benefit of Henry Duggan. The death of Henry Duggan does not remove the Continental National Bank & Trust Company from this action. Neither does it relieve the trust company from the duty to defend this action nor of its liability to the Government for the amount of the claim against assets held by it impressed with a trust for unpaid taxes. See Section 281 of the Revenue Act of 1926.

Furthermore, in view of the provisions of Section 3467 of the Revised Statutes, amended by Section 518 of the Revenue Act of 1934, c. 277, 48 Stat. 680, 760, the trust company could not avoid liability for the amount of the Government's claim, or defeat its right to maintain this action, even if it could prevail upon the proper state court to permit distribution of the trust corpus. See *United States v. Kaplan*, 74 F. (2d) 664 (C. C. A. 2d); *United States v. Porter*, 24 F. (2d) 139, 144 (Idaho); *Pennsylvania Cement Co. v. Bradley Contracting Co.*, 274 Fed. 1003 (S. D. N. Y.); *In re Vetterlein*, 44 Fed. 57 (S. D. N. Y.); *United States v. Dewey*,

39 Fed. 251 (C. C. S. D. N. Y.); *United States v. Barnes*, 31 Fed. 705 (C. C. S. D. N. Y.); *Davis v. Bargloff*, 200 Ia. 1160. The individual liability of the trustee, if it should distribute the funds in the face of these proceedings, could probably be enforced in this proceeding by supplemental pleading. See Rule 15 (d) of Federal Rules of Civil Procedure.

It is true that the death of Henry Duggan has removed him from this proceeding as a party defendant unless his personal representatives are substituted in his stead.<sup>19</sup> His removal from the case, however, is not fatal. The bill of complaint shows that he received a bequest of \$50,000 from the estate of James Duggan. Accordingly, his liability is limited to that amount. The Continental National Bank & Trust Company received \$50,000 in trust for the benefit of Timothy Duggan and his children, and received the residue of James Duggan's estate of the value of \$1,500,000 in trust for the benefit of Henry Duggan. The liability of the defendants is joint and several to the extent of the value of the assets received. *Phillips v. Commissioner*, 283 U. S. 589, 603; *Phillips-Jones Corp. v. Parmley*, 302 U. S. 233. The trust company holds assets more than sufficient to

<sup>19</sup> A motion for substitution of the Continental National Bank & Trust Company as executor of the last will and testament of Henry Duggan, deceased; is being filed by counsel for the petitioner.

satisfy the Government's claim and if the executors of the will of Henry Duggan are not substituted a judgment for the full amount of the claim can be entered against the trust company.

#### CONCLUSION

The decision of the court below is wrong and should be reversed.

Respectfully submitted.

ROBERT H. JACKSON,

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WARNER W. GARDNER,

*Special Attorney.*

SEPTEMBER, 1938.



## APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount deter-

mined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

\* \* \* \* \*

SEC. 277. (a) Except as provided in section 278—

\* \* \* \* \*

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1904, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

\* \* \* \* \*

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

SEC. 278. (d) Where the assessment of any income, excess-profits, or war-profits tax

imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods,—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

SEC. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under subdivision (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under subdivision (a) or (b), notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other



person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

SEC. 1109. (a) Except as provided in sections 277, 278, 310 and 311—

\* \* \* \*

(3) Where the assessment of any tax imposed by this Act or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (A) within six years after the assessment of the tax, or (B) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C., Title 26, Section 1432.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

## TITLE I—INCOME TAX

### SUBTITLE A—INTRODUCTORY PROVISIONS

#### SEC. 1. APPLICATION OF TITLE.

The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by legislation enacted subsequent to this Act.

## SEC. 311. TRANSFERRED ASSETS.

(a) *Method of collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraints and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title.

(2) *Fiduciaries.*—The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) *Period of limitation.*—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) In the case of the liability of an initial transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the taxpayer;

(2) In the case of the liability of a transferee of a transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the preceding transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;—

except that if before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively,—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding.

(3) In the case of the liability of a fiduciary,—not later than one year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later.

\* \* \* \* \*

### TITLE III—AMENDMENTS TO 1926 INCOME TAX

#### SEC. 504. SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS.

(a) Section 277 (b) of the Revenue Act of 1926 is amended to read as follows:

(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of dis-

traint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.<sup>18</sup>

(b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act.

SEC. 505. SAME—TRANSFEREE CASES.

(a) Section 280 (d) of the Revenue Act of 1926 is amended to read as follows:

(d) The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

(b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act.

SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.

(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.











# **In the Supreme Court of the United States**

OCTOBER TERM, 1938

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No. 22

THE UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## **REPLY TO RESPONDENTS' MOTION TO DISMISS**

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The petition for a writ of certiorari herein was filed April 5, 1938. The brief of respondents in opposition was filed April 28, 1938. In that brief counsel for the respondents sought to influence the Court to deny the writ by asserting that he was appearing only as counsel for the Continental National Bank & Trust Company of Chicago in its capacity as trustee under the trust created under Item 3 of James Duggan's will (R. 7) for the benefit of Timothy Duggan and his children. In that



brief the death of Henry Duggan on October 16, 1937, was suggested, and it was confidently asserted (Br. 1) that his death removed Henry Duggan and the trust created by Item 6 of James Duggan's will (R. 6) from the case.

Notwithstanding these facts, this Court granted the writ on May 16, 1938, in no wise limiting its scope as to parties involved. Petitioner's brief on the merits was thereafter filed on September 27, 1938, from which it appears that the death of Henry Duggan did not automatically eliminate the Continental National Bank & Trust Company as trustee under Item 6 of James Duggan's will from the case (Br. 38-42). This now appears to be conceded by the Bank. See Brief in Support of Motion to Dismiss, page 8.

On October 10, 1938, the Continental National Bank & Trust Company, purporting to appear specially, moved to dismiss the writ of certiorari as to the Continental National Bank & Trust Company as trustee under Item 6 of James Duggan's will. An affidavit attached to that motion disclosed for the first time the additional fact that on April 6, 1938, the day after the petition for a writ of certiorari was filed, the Bank physically paid over, transferred, and delivered the corpus of the trust held by it under Item 6 to the Continental Illinois National Bank & Trust Company,<sup>1</sup> another national

<sup>1</sup> The records of the Comptroller of the Currency of the United States disclose that on February 27, 1929, the Continental Illinois National Bank & Trust Company (at that time

banking institution located in Chicago.<sup>2</sup> This transfer is stated to have been without notice that a petition had been filed, but the Bank was given notice at least on April 1, 1938, when the motion to recall the mandate, for substitution, and for an order preventing distribution of the funds, was filed in the court below, that a petition would be filed.

This additional fact, in view of other circumstances of the case, furnishes no reason for dismissal, and the motion should be denied.

Both in the affidavit attached to its motion, pages 4-5, and in its brief in support thereof, page 8, it is asserted that upon the death of Henry Duggan on October 16, 1937, the title to the corpus of the trust passed immediately by operation of law to the trustee appointed by the will of Henry Duggan.

1. There is no authority for this assertion. The only case cited by respondents, *Anderson v. Messenger*, 146 Fed. 929 (C. C. A. 6th) (Br. 8), does

a state bank but later converted into a national bank) purchased all the assets of the Continental National Bank & Trust Company, except its trusts and trust properties and \$1,800,000 retained on account of reduced capital and surplus, in exchange for shares of its own stock, that it now owns all of the capital stock of the latter except directors' qualifying shares, and that all of the banking business is conducted in its name.

<sup>2</sup> The transfer purportedly was made pursuant to the provisions of Henry Duggan's will, in which he exercised the power of appointment given by Item 8 of James Duggan's will and directed that the corpus of the trust be paid over to the latter bank as trustee, subject to certain trusts.

not support this bald proposition, but if it did it would not be determinative here so long as the custody of the trust corpus did not change.

2. Unquestionably the legal and equitable rights of the beneficiaries under the power of appointment exercised by Henry Duggan became fixed when he died. That, however, does not justify or excuse ignoring the rights of the United States. The Bank held property which it received from the estate of James Duggan. In so far as the present action is concerned, that property was held in trust for the benefit of the United States to the extent of its claim here involved. See *Field v. United States*, 9 Pet. 182; *Lewis v. United States*, 92 U. S. 618; *Bayne v. United States*, 93 U. S. 642; *United States v. Carter*, 217 U. S. 286; *United States v. Barnes*, 31 Fed. 705 (C. C. S. D. N. Y.); *United States v. Dewey*, 39 Fed. 251 (C. C. S. D. N. Y.). Regardless of any duties the Bank may have had with respect to that part of the property subject to appointment by Henry Duggan, its duties as trustee for the benefit of the United States did not terminate with the death of Henry Duggan.

It is not shown that transfer of the property held under Item 6 of James Duggan's will was made pursuant to an order of any court of competent jurisdiction, or that the Continental National Bank & Trust Company has made an accounting or settlement which can operate as a discharge from its liability as trustee. The contrary is to be inferred from the statement in the brief in support of its

motion, page 10, that it was not necessary to obtain any order of distribution from any state court. Compare *Fletcher v. Commissioner*, 29 B. T. A. 503.

3. The jurisdiction of this Court to pass upon the questions brought before the Court by the writ of certiorari is not, and could not be, challenged. The mere assertion that the property held in trust at the time the petition for a writ of certiorari was filed has since been paid over to another bank does not justify dismissal of the writ. A trustee's liability to a beneficiary is not discharged in this summary manner. Furthermore, it is not claimed that the transfer of trust property has rendered the trustee insolvent, or otherwise immune from a judgment obtained against it in this proceeding. In this connection, it is to be noted that if the transfer was invalid, or was made in fraud of the rights of the United States, there remains a possibility that it can be set aside in an appropriate proceeding. While the *bona fides* of the transfer cannot yet be directly challenged, the relationship of the parties and the time and circumstances of the transfer are by no means reassuring.<sup>3</sup>

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<sup>3</sup> Upon receipt of the Bank's motion to dismiss, the Internal Revenue Agent in Charge at Chicago was directed to procure detailed information with respect to the extent and nature of the transfer, and authority therefor, but we are informed that both the Continental National Bank & Trust Company and the Continental Illinois Bank & Trust Company refused to divulge any facts in the absence of a court order directing them to do so. The limited time did not permit resort to such procedure.

4. Respondent argues in support of its motion to dismiss (Br. 8) that when a new trustee receives the trust *res* any action pending at the time against the former trustee "can no longer be prosecuted against the new trustee, and, in this case, the new beneficiaries." The principles of law approved in the decisions cited do not support this statement. All of the cases cited fully recognize the right of a fiduciary, who becomes the successor in interest of the fiduciary originally appearing, after succeeding to the title of his predecessor, to be substituted in the proceeding and prosecute or defend the action with the same rights and liabilities as the predecessor fiduciary.

Under the rule of law recognized in these and numerous other cases, if the property previously held in trust by the Continental National Bank & Trust Company has actually been transferred as alleged, the Continental Illinois National Bank & Trust Company becomes a successor trustee in so far as the trust in favor of the United States is concerned, and can properly appear and defend the present action in that capacity.

Moreover, the respondent was sued as a trustee holding property for the benefit of the United States. As pointed out above, it is not shown that by the mere transfer of that property it has relieved itself of that liability.

No Illinois cases are cited which support the contention that a trustee in the circumstances disclosed here is removed from the case. Section 54

of the Illinois Practice Act (Jones Illinois Statutes, annotated, Vol. 18, p. 249, ch. 104.054) provides that an action may be continued against the original party even after a transfer of the property. Rule 25 (c) of the new Rules of Civil Procedure, recently promulgated by this Court for the District Courts of the United States, has a similar provision.

The transfer in question was made five days after notice that the United States would file a petition for a writ of certiorari, and without notice to the Government. No mention was made of it in the brief in opposition. Orderly administration of justice requires, at the least, that a party not be allowed to take himself out of the jurisdiction of this Court.

#### CONCLUSION

In view of all the circumstances, the motion to dismiss should be denied.

Respectfully submitted.

ROBERT H. JACKSON,  
*Solicitor General.*

OCTOBER 1938.





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Continued from Page 10

ON BEHALF OF SUBSCRIBERS TO THE UNITED STATES GOVERNMENT  
BUREAU OF ALCOHOLS FOR THE REVENUE DEPARTMENT

1940



# In the Supreme Court of the United States

OCTOBER TERM, 1938

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No. 22

THE UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
TRUSTEE UNDER THE LAST WILL AND TESTAMENT  
OF JAMES DUGGAN, DECEASED, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## REPLY BRIEF FOR THE UNITED STATES

In the brief for the United States it has been argued that the suit was timely filed within the six-year collection period provided by the statute after a timely assessment. A timely assessment was made against James Duggan and the suit was instituted within the six-year period following that assessment. Respondents contend that the six-year collection period after a timely assessment is not available here (1) because the assessment was made after James Duggan's death and was therefore invalid, and (2) because even if the six-year period

would have been applicable to James Duggan it is not applicable to respondent.

These objections of the respondents were dealt with in the brief already filed. However, it is desirable also to suggest that the suit was timely because filed within the period allowed for assessment. Section 277 (a) (3) of the Revenue Act of 1926 provides a period for assessment but permits a suit to be begun within that period without actually making the assessment. This is made applicable to transferees by Section 280 (a). Accordingly, if this suit was instituted within the statutory period for assessment it should be unnecessary to consider whether it was timely within the collection period.

The corporate return was filed May 16, 1921, and thus the five-year assessment period applicable to the corporation did not expire until May 16, 1926. It is conceded that Section 280 (b) of the Revenue Act of 1926 provides an extra year for assessment against either an initial transferee or a subsequent transferee (Br. 11). Accordingly, the period for a valid assessment against transferees would not expire before May 16, 1927. While that period had still thirteen months and one day to run a deficiency letter was sent to James Duggan and he appealed to the Board of Tax Appeals.

It appears to be conceded that the Board proceedings suspended the assessment period at least as to James Duggan, so that the controversy is narrowed to whether the suspension was also ap-

plicable to respondents. In the brief already filed the Government has contended that, since a timely assessment was made against James Duggan and this is a suit to collect his liability, the entire period of suspension applicable to James Duggan is also applicable to respondents. But it will be sufficient for the purposes of this case to hold that only part of that period is applicable.

Respondent Bank was a testamentary trustee of James Duggan, and Henry Duggan was a legatee. Part of the suspension period had run before the transfers were made to the testamentary trustee and legatee. We think it is obvious that the period of suspension which elapsed while James Duggan was alive and was the sole transferee must necessarily affect the assessment period applicable to respondents. During the time that James Duggan was the sole transferee the Government had no opportunity to proceed against respondents, so that it cannot be contended that that portion of the suspension period is inapplicable because of a possible independent right to proceed against respondents.<sup>1</sup> Respondents' liability is derived from James Duggan and the transfer of the estate to respondents could not have the effect of eradicating what had then transpired. The transfer of the estate to respondents was made some time subsequent to April 24, 1931 (R. 5) and since the assessment period had not then expired as to James Duggan, it seems clear

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<sup>1</sup> Section 274 (a) would have prevented any action against James Duggan's personal representatives.



that it had not expired as to anyone subsequently succeeding to his liability. It cannot be true that a separate period for assessment against respondents had been running prior to the time of the transfer of the assets. Such a construction is wholly inadmissible. This Court considered a similar situation at the last Term in *United States v. Wurts*, 303 U. S. 414. It was there said (p. 418):

It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued.

Accordingly, if we concede for the purpose of the argument that the suspension period did not endure until September 25, 1931 (60 days after the Board's decision became final), and if we compute a separate assessment period for respondents, it will be seen that this separate period had not expired on May 6, 1932, when the suit was instituted. The suspension period began on April 15, 1926, when the deficiency letter was sent to James Duggan. Thirteen months and one day were then left of the transferee assessment period. If it is held that the suspension period ended as to respondents on April 24, 1931, and that the only time remaining for assessment against respondents was the sixty days given by Section 280 (d) and the thirteen months and one day which had not run when the suspension period began, it is clear that

upon that basis the assessment period did not expire until July 24, 1932. Therefore, under Section 277 (a) (3) of the Revenue Act of 1926 a suit could have been brought without any assessment as late as July 24, 1932. Thus this suit instituted on May 6, 1932, was timely.

We wish to emphasize that under a proper construction of the statute the suspension period cannot be taken to terminate upon the transfer of the assets held by the transferee. Any such rule would make it necessary that the Commissioner keep an impossibly close watch over the person against whom he proposes to assess the liability. But it seems worth while to point out to this Court that, even if this rule were accepted, the present action was timely. On that basis there is no necessary occasion for the Court to consider whether the assessment against James Duggan was valid or whether the six-year collection period is applicable.<sup>2</sup>

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Relying upon *United States v. Updike*, 281 U. S. 489, and *Commissioner v. Krug*, 78 F. (2d) 57 (C. C. A. 9th), respondents' contention in substance is that the period for collecting any liability from them is six years from the assessment against the original taxpayer. The transferees involved in the *Updike* and *Krug* cases received distribu-

<sup>2</sup> For the convenience of the Court there is attached as an Appendix a chronological tabulation of the important dates involved in this case.

tions directly from the original taxpayers and the time for proceeding against them as transferees was held to be dependent upon the time allowed for proceedings against the original taxpayers. Since the respondents' liability is derived directly from James Duggan, the reasoning of the cited cases appears to us to require that the time for assessing or collecting from transferees of James Duggan should be dependent upon the time allowed for proceeding against James Duggan, rather than upon the time allowed for proceeding against the original taxpayer.

Since the assessment against the original taxpayer was made in January 1925, respondents are driven to the position that the six-year collection-period had already expired when their liability first arose by the transfer of the estate subsequent to April 24, 1931. On the authority of *United States v. Wurts, supra*, we submit that there is no room for such construction.

Respectfully submitted.

ROBERT H. JACKSON,  
*Solicitor General.*

JAMES W. MORRIS,  
*Assistant Attorney General.*

SEWALL KEY,  
J. LOUIS MONARCH,  
F. E. YOUNGMAN,

*Special Assistants to the Attorney General.*

WARNER W. GARDNER,  
*Special Attorney.*

OCTOBER 1938.

## APPENDIX

May 16, 1921. Income tax return filed by Johnston City & Big Muddy Coal & Mining Company (R. 3).

December 29, 1921. Taxpayer corporation dissolved (R. 14).

December 16, 1924. Deficiency notice for \$316,620.61 mailed to corporation (R. 3).

January 1925. Additional tax of \$316,620.61 assessed against taxpayer corporation (R. 3).

April 15, 1926. Notice of transferee liability in the sum of \$295,331.64 mailed to James Duggan pursuant to Section 280, Revenue Act of 1926 (R. 14).

May 16, 1926. Five-year period for assessment against taxpayer corporation expired. Section 277 (a) (3), Revenue Act of 1926.

June 11, 1926. Appeal to Board of Tax Appeals filed by James Duggan (R. 14).

May 16, 1927. Period for assessment against James Duggan would have expired except for notice of April 15, 1926. Section 280 (b) (1), Revenue Act of 1926.

March 1929. James Duggan died (R. 5).

January 6, 1930. Findings of Fact and Opinion promulgated by Board of Tax Appeals. 18 B. T. A. 608.

January 27, 1931. Decision entered by Board of Tax Appeals fixing liability of James Duggan in the sum of \$295,331.64 (R. 11, 14-15).

February 14, 1931. Jeopardy assessment made against James Duggan for above liability and interest (R. 15).

April 24, 1931. Proof of claim filed with administrator of estate of James Duggan, deceased (R. 5).

July 27, 1931. Decision of Board of Tax Appeals became final. Section 1005, Revenue Act of 1926.

September 25, 1931. Termination of period of suspension for assessment against James Duggan. Section 280 (d), Revenue Act of 1926, as amended.

May 6, 1932. This action brought for collection of amount assessed against James Duggan (R. 1).

October 26, 1932. Expiration of period for assessment against James Duggan, as extended (thirteen months and one day after September 25, 1931).

February 14, 1937. Expiration of six-year period for collection of assessment made against James Duggan on February 14, 1931. Section 278 (d), Revenue Act of 1926.







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No. 22

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

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**THE UNITED STATES OF AMERICA, PETITIONER**

**v.**

**CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
TRUSTEE UNDER THE LAST WILL AND TESTAMENT  
OF JAMES DUGGAN, DECEASED, ET AL.**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**FURTHER REPLY TO RESPONDENTS' MOTION TO DISMISS**

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# In the Supreme Court of the United States

OCTOBER TERM, 1938

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No. 22

THE UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
TRUSTEE UNDER THE LAST WILL AND TESTAMENT  
OF JAMES DUGGAN, DECEASED, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

## FURTHER REPLY TO RESPONDENTS' MOTION TO DISMISS

On October 10, 1938, a motion was filed by the Continental Illinois National Bank & Trust Company of Chicago to dismiss the writ of certiorari in the above-entitled proceeding in so far as it related to such Bank as trustee of the residuary trust created by Item 6 of the last will and testament of James Duggan, deceased. An affidavit executed by an officer of that Bank was attached in support of the motion to dismiss in which it was stated that the Bank had on April 6, 1938, transferred to the Continental Illinois Bank & Trust Company

of Chicago, as trustee, pursuant to the terms of the will of Henry Duggan, the assets theretofore held by it as trustee under Item 6 of the will of James Duggan, deceased.

At the time respondents' motion to dismiss was filed this cause was on call for argument within a few days, leaving insufficient time for the petitioner to verify the alleged transfer. Without either admitting or denying that the transfer of trust assets had been made as alleged, the petitioner filed a reply to the respondents' motion in which it was pointed out that the alleged transfer, under the circumstances, affords no basis for granting the motion.

This Court continued the hearing of the cause on the merits pending disposition of the motion to dismiss, and other motions filed, thus affording an opportunity to verify the alleged transfer of trust assets. At the request of the Tax Division of the Department of Justice the Internal Revenue Agent in Charge at Chicago, Illinois, sought to verify the alleged transfer of assets, but both the Continental National Bank & Trust Company of Chicago and the Continental Illinois National Bank & Trust Company of Chicago, on advice of counsel, refused to disclose any facts regarding the alleged transfer. The Federal Bureau of Investigation was thereafter requested to investigate and advise the Department concerning such transfer. Again the officers of both Banks refused to disclose any information concerning the alleged transfer.

Whether the respondent Bank made a valid transfer of trust assets is a question of law, and since both Banks have refused to disclose any of the facts relating to the alleged transfer, the petitioner is not in a position to admit that a valid transfer was made. The allegation that the respondent transferred to the Continental Illinois National Bank & Trust Company of Chicago the trust assets held by it is therefore denied. The absence of proof establishing a valid transfer is accordingly an additional reason for denying the respondents' motion to dismiss.

Respectfully submitted.

ROBERT H. JACKSON,  
*Solicitor General.*

NOVEMBER 1938.



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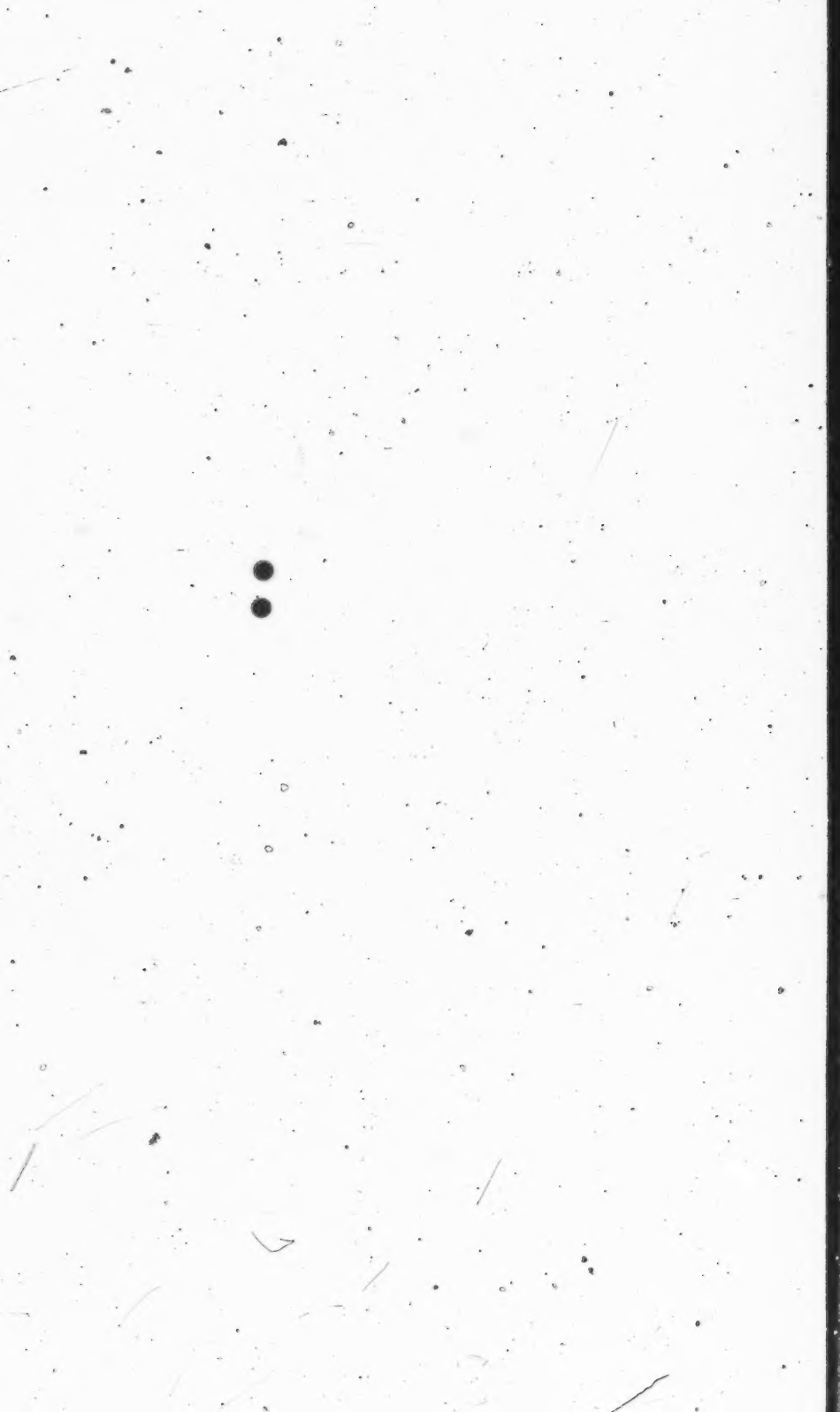
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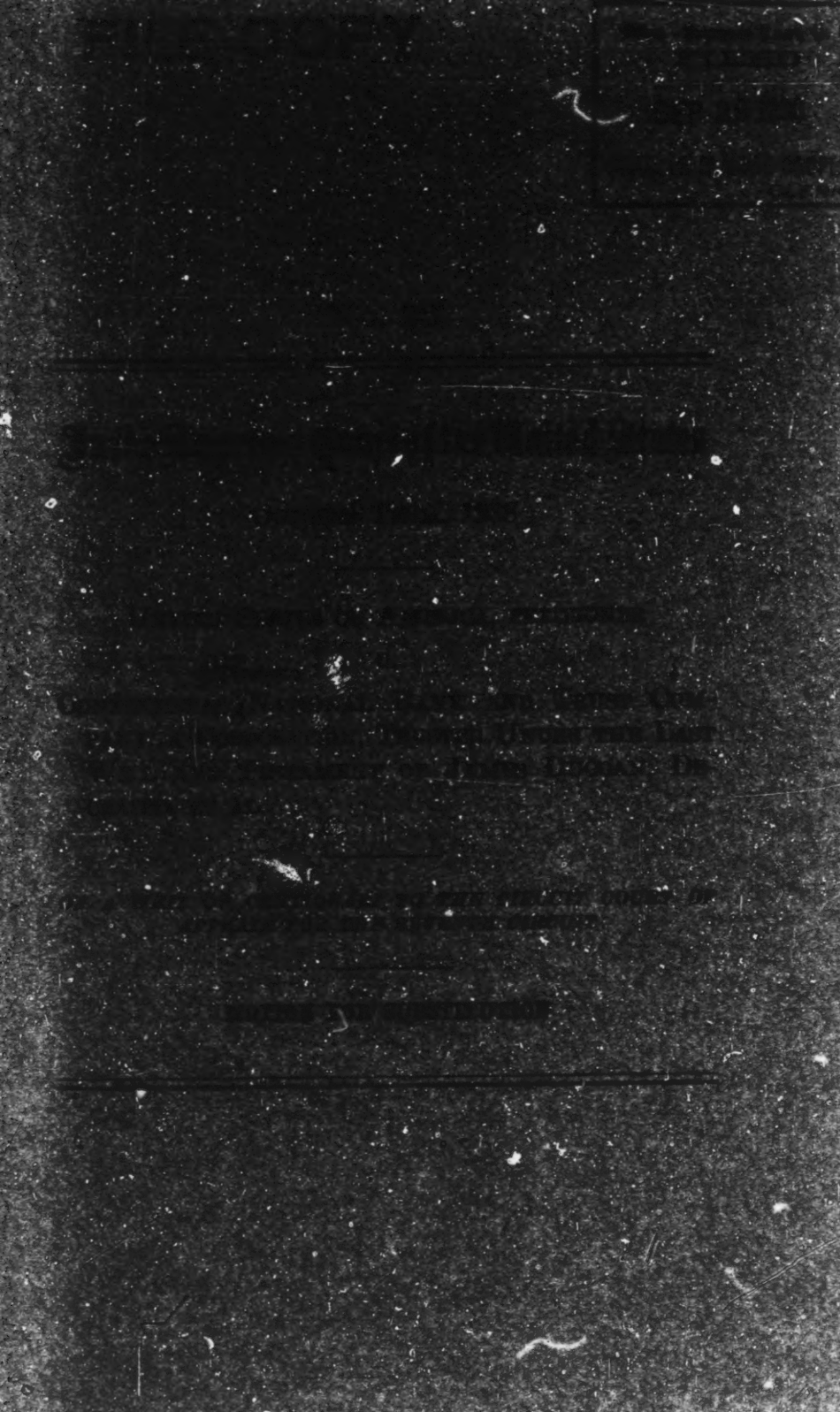
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# In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 22

UNITED STATES OF AMERICA, PETITIONER

*Illinois*

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## MOTION FOR SUBSTITUTION

In response to the suggestion of counsel for respondents (Br. in Opp., p. 1) of the death on October 16, 1937, of Henry Duggan, one of the defendants named in the Bill of Complaint in this cause, comes now the Solicitor General on behalf of the petitioner and moves that an order be entered by the Court substituting the *Illinois* Continental National Bank and Trust Company of Chicago, *Illinois*, Executor under the last will and testament of Henry Duggan, deceased, as a party defendant, and that

(1)

the proceeding he continued as to the said Henry Duggan in the name of the Continental National Bank and Trust Company as the duly qualified and appointed Executor under his last will and testament.

ROBERT H. JACKSON,  
*Solicitor General.*



**In the Supreme Court of the United States**

**OCTOBER TERM, 1938.**

---

**No. 22**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
A CORPORATION, TRUSTEE UNDER THE LAST WILL  
AND TESTAMENT OF JAMES DUGGAN, DECEASED,  
ET AL.**

---

**ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

---

**AFFIDAVIT IN SUPPORT OF MOTION FOR SUBSTITUTION**

**Fred E. Youngman, being first duly sworn, represents:**

**1. That he is now, and at all times hereinafter mentioned, was employed as an attorney in the Tax Division of the United States Department of Justice, and in the course of such employment he has acted as one of the attorneys for the United States in the above-entitled proceeding.**

**2. On November 1, 1937, the above cause came on for hearing in regular course before the United**

**(3)**

States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois. Your deponent appeared before the Circuit Court of Appeals on that date and presented oral argument on behalf of the United States. Herbert Pope, Esquire, 112 South LaSalle Street, Chicago, Illinois, appeared and presented oral argument on behalf of the defendants named in the Bill of Complaint.

3. Henry Duggan, one of the defendants named in the Bill of Complaint in the above-entitled action, died testate on October 16, 1937, while the appeal herein was pending before the Circuit Court of Appeals for the Seventh Circuit. The last will and testament of Henry Duggan, deceased, was proved on November 23, 1937, and in accordance with the terms of his will letters testamentary were granted to the Continental National Bank and Trust Company of Chicago, Illinois, as Executor of the Last Will and Testament of Henry Duggan, deceased.

4. At the time of the hearing before the Circuit Court of Appeals for the Seventh Circuit, on November 1, 1937, the death of Henry Duggan, one of the defendants named in the Bill of Complaint, was not suggested to the Court by counsel for the defendants and counsel for the United States were not advised of the death of Henry Duggan until several months later.

5. On January 5, 1938, the Circuit Court of Appeals for the Seventh Circuit filed its opinion in the above-entitled cause affirming the judgment of the

District Court of the United States for the Northern District of Illinois, and on January 26, 1938, the mandate of that Court was issued and forwarded to the Clerk of the United States District Court for the Northern District of Illinois.

6. The Solicitor General of the United States, on March 25, 1938, authorized the filing of a petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Seventh Circuit in the above cause, and on March 26, 1938, the United States Attorney for the Northern District of Illinois was instructed by the Department of Justice to suggest to the Circuit Court of Appeals for the Seventh Circuit the death of Henry Duggan and to present a motion, pursuant to Rule 17 of that Court's Rules of Practice, for an order substituting the executor of Henry Duggan, deceased, as a party defendant in such proceeding. The United States Attorney for the Northern District of Illinois on April 1, 1938, filed a motion, a copy of which is attached hereto and marked "Exhibit A", wherein he moved the Court (1) to recall its mandate issued under date of January 26, 1938, (2) to substitute as a party defendant the executor of the last will and testament of Henry Duggan, deceased, and (3) that an appropriate order be entered by the Court to prevent any distribution of assets to the detriment of the United States pending disposition by this Court of the petition for a writ of certiorari.

7. On April 5, 1938, the Circuit Court of Appeals for the Seventh Circuit denied the motion made on

behalf of the United States to recall the mandate of the Circuit Court of Appeals and to substitute the executor of Henry Duggan, deceased, as a party defendant, and for an order to prevent any distribution of assets pending disposition by this Court of the petition for a writ of certiorari. A copy of the notice to this effect, received from the Clerk of the Circuit Court of Appeals, is attached hereto and marked "Exhibit B."

8. On April 5, 1938, the Solicitor General, on behalf of the United States, filed a petition with this Court for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause. Counsel for the defendants refused to accept service of the petition for a writ of certiorari on the ground that one of the defendants named in the Bill of Complaint had died since the commencement of the action and that there had been no proper substitution of his personal representative. On May 16, 1938, this Court granted the petition for a writ of certiorari.

FRED E. YOUNGMAN.

DISTRICT OF COLUMBIA,

*City of Washington, ss.*

Subscribed and sworn to before me this 26th day of September, A. D., 1938.

[SEAL]

NELLIE E. BISHOP,

*Notary Public, District of Columbia.*

My Commission expires Jan. 15, 1939.

**EXHIBIT A**

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**In the United States Circuit Court of  
Appeals for the Seventh Circuit**

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**C. C. A. No. 6332**

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**THE UNITED STATES OF AMERICA, APPELLANT**

**v.**

**CONTINENTAL NATIONAL BANK AND TRUST COM-  
PANY, A CORPORATION, TRUSTEE UNDER THE LAST  
WILL AND TESTAMENT OF JAMES DUGGAN,  
DECEASED, AND HENRY DUGGAN, ET AL., APPELLEES**

---

**MOTION**

Comes now the United States of America, ap-  
pellant in the above-entitled cause, by its attorneys,  
Michael L. Igoe, United States Attorney for the  
Northern District of Illinois, and Raymond P.  
Drymalski, Assistant United States Attorney, and  
respectfully represents to this Court as follows:

1. That an order was entered by this Court on  
January 5, 1938, affirming the judgment of the  
District Court of the United States for the North-  
ern District of Illinois, Eastern Division; that pur-  
suant to said order the mandate of this Court was

issued and forwarded to the Clerk of the District Court of the United States on January 26, 1938.

2. That your appellant is entitled to ninety days from the date of the entry of the order of this Court within which to file its petition for certiorari in the Supreme Court of the United States; that said time does not expire until the 5th day of April, 1938.

3. That the Solicitor General of the United States, the officer of the Government charged with the duty of considering and determining whether petitions for certiorari are to be filed in the Supreme Court of the United States, has now fully considered the matter of filing a petition for certiorari in the Supreme Court of the United States in the above-entitled cause, and has just now determined that said petition will be entered; that said petition is now being prepared and will be filed forthwith.

4. That your appellant in the above-entitled cause suggests to this Court that Henry Duggan, one of the appellees in said cause, died testate on October 16, 1937, pending the appeal herein; that the Will and Testament of said Henry Duggan, deceased, was proven on November 23, 1937, and that in accordance with the terms of said Will letters testamentary were granted to the Continental National Bank and Trust Company as executor of the Will and Testament of said Henry Duggan, deceased.

5. That in the will of James Duggan, deceased, in Paragraph 8 thereof, provision is made for the termination of the Trust involved in this cause, on the death of said Henry Duggan, and for the distribution of the trust corpus in accordance with the



Will and Testament of the said Henry Duggan, deceased.

WHEREFORE, your appellant moves this Honorable Court as follows:

A. That the mandate of this Court heretofore issued and forwarded to the Clerk of the United States District Court for the Northern District of Illinois, on January 26, 1938, be recalled and stayed pending the disposition and determination of the petition for certiorari, or until the further order of this Court.

B. That this Court enter its order substituting as party appellee in this cause, for Henry Duggan now deceased, the Continental National Bank and Trust Company, executor of the Last Will and Testament of Henry Duggan, deceased.

C. That this Court enter an appropriate order to prevent any distribution of assets to the detriment of your appellant pending disposition by the Supreme Court of the United States of your appellant's petition for certiorari.

MICHAEL L. IGOE,

*United States Attorney.*

RAYMOND P. DRYMAJSKI,

*Assistant United States Attorney.*

*Attorneys for Appellant.*

STATE OF ILLINOIS,

*County of Cook, ss:*

JOHN DZIEDZIC, being first duly sworn, on oath deposes and says that he is employed as Clerk in the office of the United States Attorney, Chicago, Illinois; that on March 31, 1938, at the hour of 2:10 p. m. he called at the office of Butler, Pope, Ballard, and Elting, 120 S. La Salle Street, Chicago, Illinois, for the purpose of serving a copy of the above

Motion; that he did serve a copy of said Motion on Herbert Pope, one of the attorneys of said firm, and that said Herbert Pope retained a copy of said Motion in his office, but refused to receipt for same.

JOHN DZIEDZIC.

Subscribed and sworn to before me this 31st day of March, A. D. 1938.

ANNA L. MINAHAN.

*Notary Public.*

RECEIVED copy of the above Motion this ---- day of March, A. D. 1938.

-----,  
*Attorneys for Appellees.*

## EXHIBIT B

---

OFFICE OF THE CLERK, UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT,  
*Chicago, April 5, 1938.*

DEAR SIR: An order was entered in this court today in Cause No. 6332, *The United States of America vs. Continental National Bank and Trust Co., Trustee, et al.*, denying motion of counsel for appellant to recall the mandate of this Court in this cause heretofore issued on January 26, 1938. Denying motion of counsel for appellant to substitute Continental National Bank and Trust Co., Executor of the Last Will and Testament of Henry Duggan, deceased, as party appellee, for Henry Duggan, deceased. And denying motion of counsel for appellant for an order to prevent any distribution of assets pending disposition by the Supreme Court of appellant's petition for writ of certiorari.

Respectfully,

FREDERICK G. CAMPBELL,

*Clerk.*

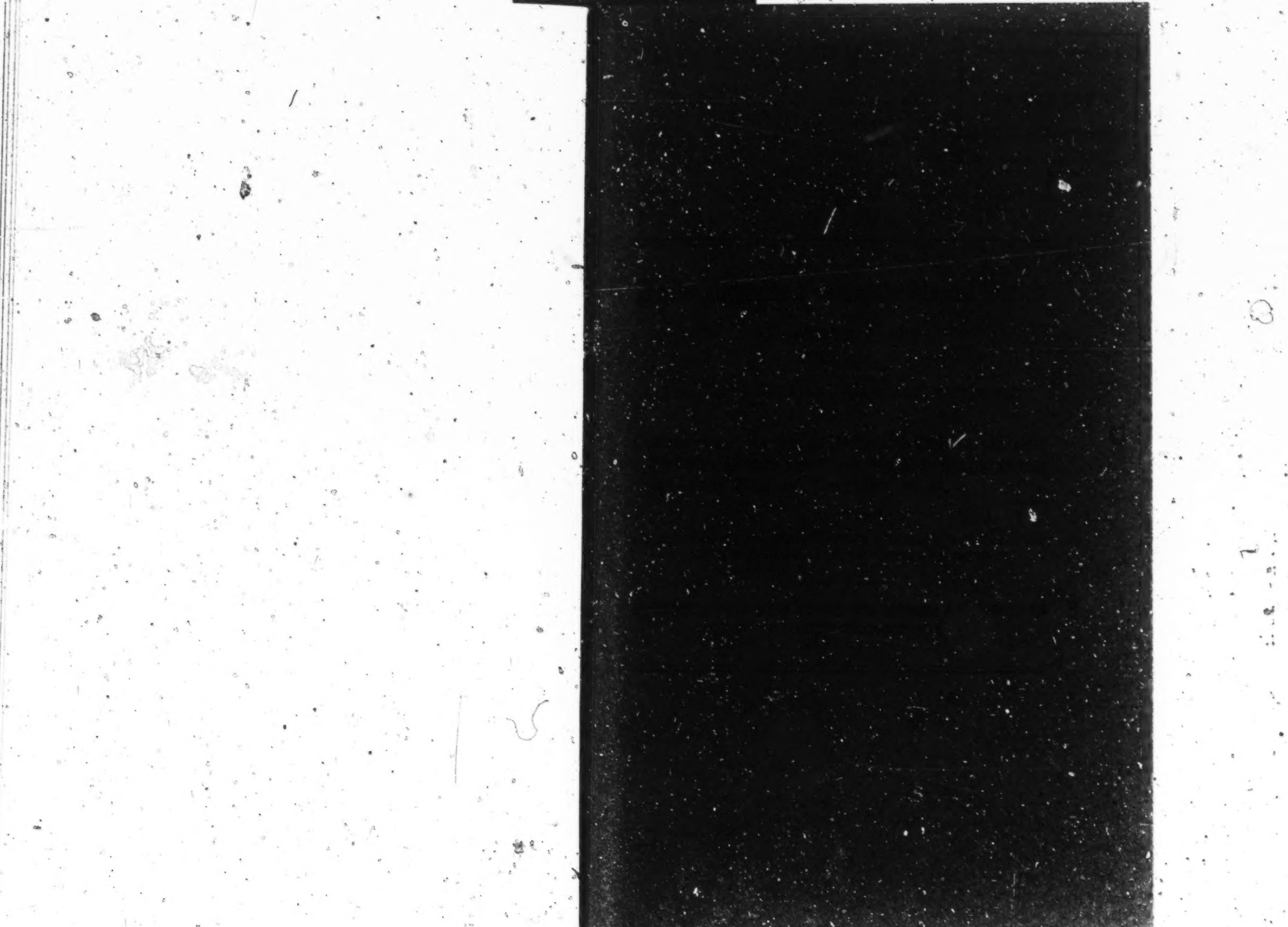
To:

M. L. Igoe, U. S. Attorney, Chicago.

James W. Morris, Ass't Attorney General,  
Washington.

Herbert Pope & Benjamin M. Price, 120 S.  
La Salle St., Chicago.

(11)





# In the Supreme Court of the United States

OCTOBER TERM, 1938

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No. 22

THE UNITED STATES OF AMERICA, PETITIONER

v.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY,  
TRUSTEE UNDER THE LAST WILL AND TESTAMENT  
OF JAMES DUGGAN, DECEASED, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

MOTION TO JOIN NEW PARTY DEFENDANT

---

Comes now the Solicitor General, on behalf of the United States, petitioner in the above-entitled proceeding, and moves that an order be entered by the Court joining as a party defendant in this proceeding the Continental Illinois National Bank & Trust Company of Chicago, a national banking corporation with offices at Chicago, Illinois, as trustee under the power of appointment exercised



by Henry Duggan, deceased, by his last will and testament, over property previously held in trust by Continental National Bank & Trust Company of Chicago in trust under the will of James Duggan, deceased, and that the action be continued against the Continental Illinois National Bank & Trust Company of Chicago in such capacity as well as against the other parties heretofore joined as defendants.

ROBERT H. JACKSON,  
*Solicitor General.*

---

**BRIEF IN SUPPORT OF MOTION TO JOIN AN ADDITIONAL  
DEFENDANT**

1. This is an equity action by the United States, and was originally instituted against several defendants, one of which was Continental National Bank & Trust Company of Chicago as residuary trustee under Item 6 of the last will and testament of James Duggan, deceased, which left the residue of his estate to such Bank to pay the income therefrom to Henry Duggan for life. Item 8 of that will provided that upon the death of Henry Duggan the trust should cease and determine, and the trust estate then in the hands of the trustee "shall be paid, transferred, and delivered over as may be designated and appointed in and by the last Will and Testament of my said brother, Henry Duggan".

(R. 8). Henry Duggan had received a bequest of \$50,000 under Item 2 of the will of James Duggan (R. 7), and for that reason had been joined as an original party defendant in the proceeding below.

Henry Duggan died testate on October 16, 1937, prior to the argument of this case before the Circuit Court of Appeals, but that fact was not revealed to the court below and counsel for petitioner were not so advised until after the decision of the court below.

The brief filed in opposition to the petition for a writ of certiorari suggested the death of Henry Duggan, but no appearance or request for substitution was made by his executors. Counsel for petitioner thereupon filed a motion with the Court for substitution in his stead of the Continental Illinois National Bank & Trust Company of Chicago, the duly appointed and qualified executor of his last will and testament. That motion is now before the Court for consideration.

Counsel for the Continental National Bank & Trust Company, appearing specially, have filed a motion to dismiss the writ of certiorari in so far as it relates to that Bank as trustee under Item 6 of James Duggan's last will and testament. A statement opposing the granting of that motion has been filed by the petitioner, wherein it is shown that the motion is without merit and should be denied.

2. The affidavit of an officer of Continental National Bank & Trust Company submitted in support of its motion to dismiss indicates that the Continental Illinois National Bank & Trust Company probably has succeeded to the title of the property previously held in trust for the benefit of the United States. Although the facts now disclosed are not sufficient to show that the Continental National Bank & Trust Company has been discharged from liability under its trust, or that it cannot respond to a judgment against it, the Continental Illinois National Bank & Trust Company now has such an interest in the proceeding that it should be ordered to appear and defend this action.

If the Continental Illinois National Bank & Trust Company has succeeded to the title of the property impressed with a trust in favor of the United States it can be joined as a party. Compare *Greenleaf v. Queen*, 1 Pet. 138; *United States v. Dunn*, 268 U. S. 121; *Larimer v. Snell*, 181 Ill. App. 50; *Ekstrom v. United States*, 21 F. Supp. 338 (C. Cls.).

Joinder of new parties under circumstances such as presented by the record in this case is specifically provided for in Rule 25 (c) of the Federal Rules of Civil Procedure. A similar provision, making express provision for joinder in the trial court or the appellate courts, is contained in Section 54 of the Civil Practice Act of the State of Illinois, approved June 23, 1933. See Jones Illinois Statutes, Annotated, Vol. 18, p. 249, c. 104.054.

In view of the undisclosed character and extent of the alleged transfer of trust assets, and in order that the interest of the petitioner may be protected until the liability can be judicially determined, the substitution requested should be ordered.

Respectfully submitted.

ROBERT H. JACKSON,  
*Solicitor General.*

OCTOBER 1938.



FILE COPY

Office - Supreme Court, U. S.

FILED

APR 28 1938

CHARLES ELMORE OROPLEY  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1937.

No. [REDACTED] 22

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.,

*Respondents.*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI.**

✓ HERBERT POPE,

*Counsel for Continental National  
Bank and Trust Company of  
Chicago, Solely as Trustee under  
Will of James Duggan, Deceased,  
for the children of Timothy  
Duggan.*

April 27, 1938.





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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1937.

---

**No. 934**

---

**UNITED STATES OF AMERICA,**

*Petitioner,*

*vs.*

**CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.,**

*Respondents.*

---

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI**

---

The affidavit of service of notice of the filing of a petition for writ of certiorari in this cause in this court states that the notice was mailed to the undersigned as "attorney of record for the respondent." The word "respondent" is no doubt used advisedly, because the death of Henry Duggan on October 16, 1937, which is hereby suggested, removed him and the trust for his benefit from the case, and the record filed in this court not only shows no substitution of the personal representative of Henry Duggan but there is no means by which the persons whose interests in the trust property vested on Henry Duggan's death, under paragraph (8) of the will of James Duggan (R. 11), can be

brought into this proceeding. The bill in this cause does not reach them, and, as to the trustee of that trust, the cause of action was against the trust company solely as trustee and necessarily terminated with the termination of the trust and with the trust company's ceasing to be a trustee thereof.

It is true, therefore, that there is in this court only one real respondent, and that is the trustee of the \$50,000 trust under James Duggan's will for the benefit of Timothy Duggan and his children. It is on behalf of that trust that this answer is filed, and in that connection the death of Timothy Duggan on September 4, 1935, is also hereby suggested, though that death does not change the position of that trust or of the trustee.

The bill in this case named as defendant Continental National Bank and Trust Company, "a corporation organized and existing under the laws of the State of Illinois." (R. 2.) No such national bank could, of course, have any existence. The trustee is described in paragraph (3) of James Duggan's will (R. 10) as "Continental National Bank and Trust Company of Chicago, a corporation organized under the laws of the United States of America," and, so far as the trust for the children of Timothy Duggan is concerned, it is for that trust company that this answer is filed.

It is submitted that, under the rules of this court governing petitions for writs of certiorari, there is no ground for the granting of the writ in this case. If the Revenue Act of 1923 applies, because this case involves a proceeding against a transferee of a transferee, as the Circuit Court of Appeals has held, the rules of this court do not provide for a review of that decision, inasmuch as there is no contrary decision of any other Circuit Court of Appeals on that question. If, on the other hand, the Revenue Act of

1926 applies, there is still no ground for the granting of the writ, inasmuch as the decision of this court in the case of *United States v. Updike*, 281 U. S. 489, would then lead also to the conclusion that the bill was properly dismissed, as we shall show. Before doing this, however, we think this court should have a better understanding of the history of this strange case than is disclosed by the petition.

#### HISTORY OF THE CASE.

In view of the fact that the proceedings in the Board of Tax Appeals in the case of James Duggan have been brought to the attention of this court by the allegations in the bill, we call attention to the reported proceedings in that case. The proceedings before the Board (18 B. T. A. 608) show that the transaction involved in this case occurred in 1920 by reason of a sale of coal mining property which had belonged to the Johnston City and Big Muddy Coal and Mining Company. The stock of that company had been owned by four brothers and sisters, but before 1920 the stock had been transferred to trustees, under a written trust instrument, to be held for their benefit and the survivor of them. In 1920 there was an opportunity to sell the principal mine owned by the company. At that time decisions and statements of this court justified the belief that increase in the money value of property was not taxable income in the years in which the increase occurred or in the year of the sale. *Lynch v. Turrish*, 247 U. S. 221, 230. However, out of an abundance of caution, the mine in question was conveyed to the trustees owning the stock of the corporation, and, as contended in the Board proceeding, was not sold by the corporation.

Unfortunately, the case was heard by a member of the Board of Tax Appeals who was not a lawyer, as his opinion clearly shows, 18 B. T. A. 608. In holding that the corpo-



ration realized a taxable gain he ignored altogether the existence of the written trust instrument, although the Commissioner and the Board already had recognized its existence and effect when the question of an estate tax arose on the death of one of the beneficiaries. (*Hanna Duggan Estate*, 6 B. T. A. 1098; 8 B. T. A. 482.)

The corporation was dissolved in 1921. (R. 6.) It was an Illinois corporation and, under the laws of that state, its existence for the purpose of being sued was continued only for two years after dissolution. The assessment for the tax liability claimed in this case was not made against the corporation until 1925. (R. 5.) If the assessment was effectual, then the period of limitation for the commencement of suits to collect the tax claimed expired six years after the assessment, or in 1931. (Section 278(d) of Revenue Act of 1926.) If the assessment was of no effect, then the period of limitation expired five years after the return was filed, or in 1926. (Section 277(a)(3) of Revenue Act of 1926.)

The bill of complaint in this case was filed on May 6, 1932. A motion to dismiss was filed by certain defendants January 16, 1933. (R. 17.) Four years later, on January 11, 1937, the complainant confessed the motion to dismiss its bill (R. 19), and, on leave granted, amended its bill of complaint for the sole purpose of alleging the making of a jeopardy assessment on February 14, 1931, against James Duggan, who had died about two years before, on March 1, 1929. (R. 20, 22.) The motion to dismiss was renewed to cover the bill as amended. (R. 19.)

The only basis for this jeopardy assessment against a dead man was a decision or order entered in an *ex parte* proceeding before the Board of Tax Appeals after James Duggan's death. The Board proceeding shows that Michael Duggan as well as his brother James Duggan ap-

pealed to the Board on account of a determination by the Commissioner of the same tax liability. Michael Duggan died before James Duggan, and the Board determined after their deaths that Michael Duggan was not liable while James Duggan was, on some theory that he individually, instead of the trustees owning the stock, got all the proceeds of the sale.

When the Board filed its opinion on January 6, 1930, James Duggan had been dead since March 1, 1929, and his former counsel on April 9, 1929, had filed a suggestion of his death. See 21 B. T. A. 740, where the proceedings in the Board between December 10, 1928, and December 16, 1930, the date of the Board's "memorandum," are fully set forth and indicate, as was the fact, that James Duggan's former counsel, Mr. Prettyman, definitely retired from the case upon filing the suggestion of Duggan's death. It is clear that the Board proceeded with the case and filed its findings of fact and opinion on January 6, 1930, and its final computation and determination on January 27, 1931, *ex parte*, with only the Commissioner represented before it. The jeopardy assessment against James Duggan, deceased, based upon the determination of the tax by the Board, was made February 14, 1931, within sixty days after the Board's decision, and therefore during the time, according to petitioner, that the right to make an assessment was suspended.

James Duggan was the survivor of the original four owners of the stock of the coal company. Since then two other brothers, Timothy and Henry, have died. .

## THERE IS NO GROUND FOR THE ISSUANCE OF THE WRIT OF CERTIORARI.

The original bill of complaint was based upon the trust fund theory and sought to collect a tax, alleged to be due from the corporation, from transferees of a transferee of corporate funds. The confession of the motion to dismiss the bill of complaint in 1937 was an admission that, in view of the decision of this court in the *Updike* case, *supra*, the original bill stated no cause of action. The amended bill of complaint did nothing but add the jeopardy assessment against James Duggan which was made nearly two years after his death. That even counsel for petitioner had little confidence in the efficacy of this assessment is indicated by the fact that in a little more than a month from the time the bill was amended six years would have expired since the assessment was made. It was obviously a last resort at the eleventh hour, and, as we shall show, has nothing to do with the cause of action stated in the bill against the respondent.

There are two reasons why the amended bill of complaint does not improve the position of petitioner. In the first place, the cause of action stated in the bill was already barred under the *Updike* decision, before the jeopardy assessment was made, and the jeopardy assessment, even if it had any validity, could not revive a cause already lost.

In the second place, the jeopardy assessment against James Duggan, deceased, has no relation to the cause of action stated in the bill of complaint against the respondent.

1. The first reason is made clear by the opinion of this court in the *Updike* case, *supra*. That decision is based upon the conclusion that if "the period of limitation had run in favor of the corporation, it had run in favor of the transferees," so far as a suit against them was concerned.

It is not questioned that the period of limitation for suit against the corporation in this case had expired either in May, 1926, or in January, 1931. Therefore, suit against this respondent as a transferee was barred before this suit was begun in 1932.

In the Circuit Court of Appeals counsel for petitioner sought to avoid this conclusion by insisting that respondent was not a transferee of the corporation at all. It was contended that respondent was merely a transferee of James Duggan and that the liability of James Duggan was somehow a liability independent of the asserted tax liability of the corporation. This theory was obviously in conflict with all the allegations in the bill of complaint which asserted the liability of the corporation for taxes and prayed that the defendants be accountable to the plaintiff "for the aforesaid taxes." "Taxes as aforesaid" were not James Duggan's taxes but the corporation's taxes. (R. 6, 9).

This theory is abandoned in the petition for writ of certiorari, possibly in the hope of avoiding the conclusion of the Court of Appeals that this case is governed by the Revenue Act of 1928. It is now contended by the learned Solicitor General that the respondent is, in fact, the original transferee of the corporation appearing in a representative capacity for James Duggan, and therefore petitioner "does not seek to subject the trustee to liability as a transferee of a transferee." (Petition, p. 11.)

This is certainly the most astonishing proposition yet advanced in this case. It leaves Henry Duggan and the other individual defendants entirely out of the case. Now that Henry Duggan is dead this may be as well, and so also as to those now vested with ownership of the property formerly held in trust for Henry Duggan. As to this respondent now acting as trustee for Timothy Duggan's children the contention is wholly untenable.

Surely a testamentary trustee who takes property as a legatee under a will does not act in a "representative capacity" for the decedent. Such a trustee under James Duggan's will is just as much a transferee of James Duggan as Henry Duggan was. The trustee for Henry Duggan was in the same position as to the trust property that Henry Duggan was as to the property given to him outright. The same thing is true of this respondent as the trustee for the children of Timothy Duggan.

The learned Solicitor General has evidently forgotten about the case of *Hulburt v. Commissioner*, 296 U. S. 300, in which this court held that a proceeding against an executor as the personal representative of the decedent, a transferee of the corporate taxpayer, could not be treated as a proceeding against the executor as a legatee.

It is impossible, therefore, to escape from the decision in the *Udike* case, *supra*, by this contention now made in the petition for writ of certiorari. It is clear that this suit against this respondent as well as against Henry Duggan is a suit against transferees of a transferee of the corporate taxpayer, and, since suit against the taxpayer is barred it is barred also against this respondent as a transferee. It is not necessary to consider what the result might have been if a suit had been brought against the personal representative of James Duggan. And it is clear also that the decision of the Court of Appeals in this case is not inconsistent with the decision of this court in the *Udike* case, as the petitioner suggests (p. 15).

The petitioner also claims (p. 15) that *Helvering v. Newport Company*, 291 U. S. 485, is inconsistent with the decision of the Court of Appeals in this case. That case, however, was an appeal from a Board proceeding under Section 280. Section 278(d) was not mentioned and was in no way involved. The transferee had given a waiver

which extended the period for assessment against it beyond the time when the 60-day notice of transferee liability was mailed to it. The provision of Section 278 which the court held applicable to this transferee proceeding was 278(c), which provides:

“(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon.”

In other words, Section 278(d) cannot be said to have been actually applied to Section 280 in the *Updike* case, because it was not a proceeding under Section 280, nor in the *Newport* case, because Section 278(d) was neither mentioned nor in any way involved.

In this connection the petitioner says (p. 17) that the decision below also conflicts with *City National Bank v. Commissioner*, 55 F. (2d) 1073. This also was an appeal from a Board proceeding under Section 280. The Board proceeding was timely under 280 (b) (1), but the bank contended that there had to be an assessment against its transferor. The period for starting such a proceeding under 280 (b) (1) is one year after the expiration of the period for assessment against the transferor. That does not mean, however, that an assessment against the transferor is a prerequisite, and the court so held. No question regarding the position of a transferee of a transferee was presented in that case.

2. The amended bill of complaint did not change the cause of action against this respondent and when the complainant confessed the motion to dismiss the original bill it confessed the amended bill as well. The liability of the defendants on account of the tax claimed against the corporation was just the same after as before the amendment, and the amended bill was therefore properly dismissed.



It is clear that the Board proceeding involving James Duggan did not suspend the right to bring a suit against the respondent as a transferee of the coal company. A suit could have been commenced against it before the entry of what petitioner claims was the final order in the Board proceeding. The property in the James Duggan estate could have been and in fact was transferred in due course some months before January, 1931. No claim was filed in the probate court in Florida within the proper time or at any time in the James Duggan estate asserting liability for the tax claimed against the coal company. Accordingly, the property in the estate was transferred in due course to the legatees under James Duggan's will. These legatees had no right to appear even voluntarily in the Board proceeding.

If suit against the taxpayer, the coal company, was barred in 1926, then a suit brought against this respondent as transferee in 1930 would have been barred also under the decision in the *Updike* case, *supra*, even though no final order had been entered in the Board proceeding. The entry of a so-called final order by the Board in January, 1931, and the making of a jeopardy assessment against James Duggan in February, 1931, could have no effect upon a suit already brought against respondent. The result must be the same as to this suit actually brought against respondent in 1932. There cannot be two periods of limitation with reference to the same cause of action against the same party.

This should be a complete answer to the contention of petitioner in this case. In addition to that, however, it seems incredible that the Commissioner can keep a proceeding in the Board alive for an indefinite period when the Commissioner is the only party to the proceeding. Either such a proceeding abated at the death of the other

party, if no personal representative was substituted within a reasonable time, or the proceeding must be still pending. There could be no valid final decision against a dead person. For the same reason neither a jeopardy assessment nor any other assessment against a dead person, based upon an *ex parte* decision, could be of any legal effect. Certainly it could be of no effect as to another transferee. Whether a jeopardy assessment against a dead person could under some circumstances be of some effect in connection with a proceeding against the personal representative of such decedent we need not inquire. A jeopardy assessment against a person who has been dead two years has a suggestion of humor but not of due process of law.

When the Commissioner and the Board elected to proceed without any other party, and when *ex parte* decisions and orders were rendered against the decedent, there was no longer an adversary proceeding pending and that case must be treated as having abated upon the death of James Duggan. If that is so, then even the jeopardy assessment came too late for any purpose.

There is another curious feature to this jeopardy assessment. It is contended that the period for assessment against James Duggan was suspended during the Board proceeding and until sixty days after the so-called final decision of the Board. Yet the jeopardy assessment relied on was made during this alleged period of suspension. If a jeopardy assessment can be made at any time within the prescribed period in the unlimited discretion of the Commissioner, then it is nonsense to claim that there is any suspension of the period for assessment. Either a jeopardy assessment is a special kind of assessment, and there is no period during which the making of such an assessment is suspended, or the provision for the suspension of assessments is utterly meaningless. If the right to make a jeopardy

ard assessment is never suspended, then in this case the time for making a jeopardy assessment had expired on May 16, 1927, almost four years before it was made. There is no provision in the statute which gives a longer period for the making of jeopardy assessments than other assessments, and if the period of suspension does not apply to jeopardy assessments then the period for making a jeopardy assessment must expire without reference to any period of suspension. Otherwise the statute as it stands does not make sense.

It may be that a final determination of lack of jurisdiction by the Board of Tax Appeals in a case in which the taxpayer as well as the Commissioner are represented would be a final decision which would end the period suspending the right to assess. See *American Equitable Assurance Co. v. Helvering*, 68 F. (2d) 46. But where the taxpayer dies and no one is substituted as a party the Commissioner would be in control of the litigation and might postpone a final decision for many years. At the end of that time, according to petitioner, a jeopardy assessment could be made against a taxpayer long dead and within six years a suit could be begun against a transferee of the decedent. This process could be repeated indefinitely with successive transferees. A statute intended to be a statute of repose would provide no repose whatever.

We submit that whether the Revenue Act of 1928 or the Revenue Act of 1926 is held to apply, there is no basis for the granting of a writ of certiorari in this case. No cases have been cited by petitioner which show any conflict of decisions on the vital questions involved in this case. The petitioner has changed its own theories several times and certainly the last theory presented in its petition is one which finds no support in any decision. One generation of the Duggan family has been pursued to the grave by the

tax collector without any reasonable justification. There is no good ground for pursuing another generation in the same fashion. Eighteen years should be enough for any tax case, particularly when it involves the determination of the when, how and why of a so-called realized gain in the case of several persons no longer living.

Respectfully submitted,

HERBERT POPE,  
*Counsel for Continental National  
Bank and Trust Company of Chi-  
cago, solely as Trustee under  
Will of James Duggan, deceased,  
for the children of Timothy  
Duggan.*



FILE COPY

U. S. Supreme Court, U. S.  
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OCT 8 1938  
CHARLES ELMORE CROPLEY  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

No. 22

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

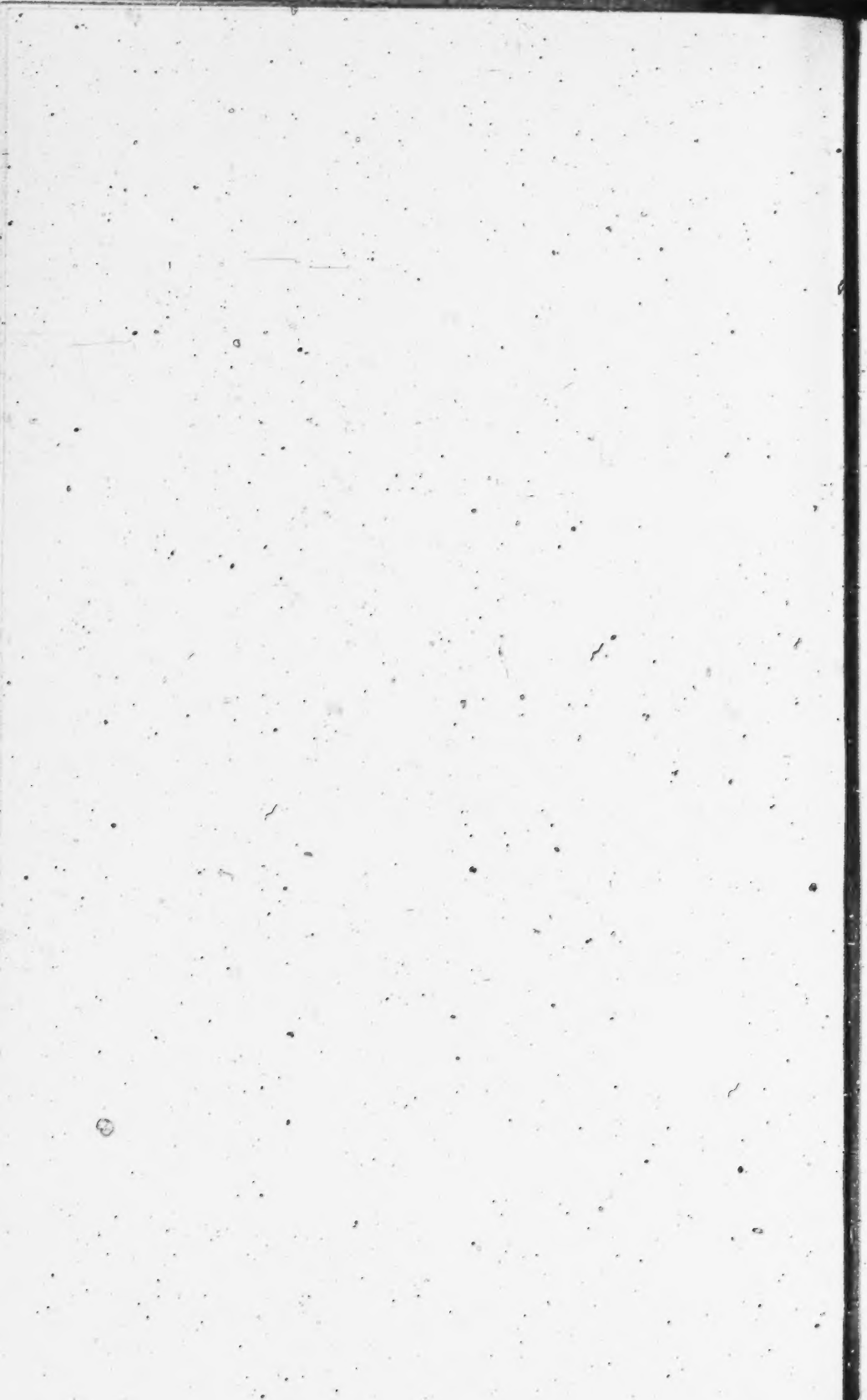
CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST  
WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

*.On Writ of Certiorari to the Circuit Court of Appeals  
for the Seventh Circuit.*

MOTION TO DISMISS WRIT OF CERTIORARI AND BRIEF  
IN SUPPORT THEREOF.

CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY OF CHICAGO,  
By EDWARD H. McDERMOTT,  
*Its Attorney-in-Fact.*





IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

---

No. 22.

---

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST  
WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

---

*On Writ of Certiorari to the Circuit Court of Appeals  
for the Seventh Circuit.*

---

**MOTION TO DISMISS WRIT OF CERTIORARI**

---

Comes now Continental National Bank and Trust Company of Chicago, a national banking association with its principal office in Chicago, Illinois, appearing specially and not generally and solely for the purpose of this motion, and moves that an order be entered by the court dismissing said writ of certiorari as to Continental National Bank and Trust Company of Chicago, as Trustee under Item 6 of the last will and testament of James Duggan, deceased, and in support of said motion shows to the court the following:

1. Before this court granted a review on the writ of

certiorari in this cause said Continental National Bank and Trust Company of Chicago ceased by operation of law to be Trustee under Item 6 of the last will and testament of James Duggan, deceased, and the corpus of the trust created by said Item 6 passed to and was paid, transferred and delivered over to Continental Illinois National Bank and Trust Company of Chicago, a separate national banking association with its principal office at Chicago, Illinois, as Trustee under certain trusts designated by Henry Duggan, deceased.

2. Said Continental National Bank and Trust Company of Chicago is not now and has at no time since this court granted a review of this cause on writ of certiorari been Trustee under said Item 6 of the last will and testament of James Duggan, deceased, nor has it held any of said trust estate since the granting of said review.

CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY OF CHICAGO,

By EDWARD H. McDERMOTT,

*Its Attorney-in-Fact.*

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

---

No. 22.

---

UNITED STATES OF AMERICA,

*Petitioner,* ○

vs.

CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST  
WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

---

*On Writ of Certiorari to the Circuit Court of Appeals  
for the Seventh Circuit.*

---

STATE OF ILLINOIS, {  
COUNTY OF COOK. } ss.AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS  
WRIT OF CERTIORARI.

---

B. E. BRONSTON, being first duly sworn, deposes and  
says:.1. Affiant is now and at all times hereinafter mentioned  
was Assistant Secretary of Continental National Bank and  
Trust Company of Chicago, a national banking association.

2. Under Item 3 of the last will and testament of James Duggan, deceased, said corporation was appointed as Trustee of the sum of \$50,000 for the benefit of Timothy Duggan and certain other beneficiaries. Said corporation accepted said trust and has for several years last past been and still is acting as Trustee under said trust.

3. Under Item 6 of said will said corporation was appointed as Trustee of the "rest, residue and remainder" of the estate of said James Duggan, deceased, to pay income therefrom to Henry Duggan for life. Item 8 of said will provided with respect to said trust as follows:

"Upon the death of my said brother, Henry Duggan, the said trust shall cease and determine and the trust estate, then in the hands of the said Trustee shall be paid, transferred, and delivered over as may be designated and appointed in and by the last will and testament of my said brother, Henry Duggan."

Said corporation accepted said trust created by said Item 6 and continued to act as Trustee thereunder until October 16, 1937.

4. On October 16, 1937, said Henry Duggan died leaving a last will and testament and codicil, in which he appointed and provided that the trust estate then in the hands of said corporation as Trustee under said Item 6 should be paid, transferred and delivered over to Continental Illinois National Bank and Trust Company of Chicago, a national banking association, separate and distinct from said Continental National Bank and Trust Company of Chicago, as Trustee upon certain trusts designated by the said Henry Duggan.

5. In accordance with said Item 8 of said will of said James Duggan, deceased, the aforesaid trust created by said Item 6 ceased and determined on October 16, 1937, and the right and title to the corpus of said trust passed by operation of law to said Continental Illinois National Bank

and Trust Company of Chicago. The corpus of said trust created by said Item 8 was physically paid, transferred, and delivered over to said Continental Illinois National Bank and Trust Company of Chicago on April 6, 1938, and before the receipt of notice of the application by the petitioner to this court for a writ of certiorari.

6. On January 10, 1938, more than two weeks prior to the issuance of the mandate of the Circuit Court of Appeals for the Seventh Circuit in this cause, counsel for petitioner were informed by counsel who had represented said Henry Duggan in this proceeding that he had died on October 16, 1937.

7. On April 1, 1938, long after the issuance of said mandate, petitioner filed with the Clerk of the Circuit Court of Appeals for the Seventh Circuit in this cause a motion reciting that under Item 8 of said will of James Duggan, deceased, provision is made for the termination of the trust created by Item 6 thereof and for the distribution of the corpus of the trust in accordance with the will of said Henry Duggan, deceased. Said motion prayed that an order be entered prohibiting any distribution of the assets pending disposition of petition for certiorari to this court. Said motion was denied on April 5, 1938, and no error has been assigned nor review sought with respect to said denial.

8. On September 30, 1938, notice was sent to the Commissioner of Internal Revenue advising that the trust created by said Item 6 of said will of James Duggan, deceased, had ceased and determined in accordance with Item 8 of said will by reason of the death of Henry Duggan and that the trust estate had been paid, assigned, transferred and set over to Continental Illinois National Bank and Trust Company of Chicago.

9. The termination of said trust created by said Item 6 of said will of James Duggan, deceased, and the termination



of the trustee capacity of Continental National Bank and Trust Company of Chicago with respect thereto was suggested of record herein in the brief of respondent in opposition to the petition for a writ of certiorari but no action has been taken by the petitioner to dismiss from this proceeding said Continental National Bank and Trust Company of Chicago as Trustee under said Item 6 of said will of James Duggan, deceased.

B. E. BRONSTON.

SUBSCRIBED and SWORN to before me this 6th day of October, 1938.

WILLIAM P. BEST,  
*Notary Public.*

My commission expires May 24, 1941.

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

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No. 22.

---

UNITED STATES OF AMERICA,

*Petitioner.**vs.*

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET. AL.

*On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.*

---

**BRIEF IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI.**

---

Upon the death of Henry Duggan on October 16, 1937, the trust created under item 6 of the last will and testament of James Duggan, deceased, ceased and determined (foregoing affidavit, paragraph 3).

As the Continental Illinois National Bank and Trust Company of Chicago, a national banking association separate and distinct from Continental National Bank and Trust Company of Chicago, was designated and appointed

by Henry Duggan to receive the trust *res* and hold the same upon certain trusts, the title to the trust *res* passed at once by operation of law from the old trustee to the new. Trusts and Trustees, Bogert, Volume 4, Section 1003, p. 2941; *Anderson v. Messinger*, 146 Fed. 939, 948 (C. C. A. 6).

On April 6, 1938, after the mandate of the Circuit Court of Appeals for the Seventh Circuit had issued in this cause affirming the judgment of the District Court and after the denial by the Circuit Court of Appeals of petitioner's motion to enjoin the Continental National Bank and Trust Company of Chicago from distributing the assets of the trust, the trust estate was physically paid, transferred and delivered over to Continental Illinois National Bank and Trust Company of Chicago as trustee upon certain trusts designated by Henry Duggan, deceased. The trustee capacity of the Continental National Bank and Trust Company of Chicago had therefore entirely ceased before this Court granted a review of this cause on writ of certiorari, and the trust *res* had passed beyond the control of the bank.

When the powers of a trustee cease and a new trustee receives the trust *res* any action pending at the time against the former trustee can no longer be prosecuted against the new trustee, and, in this case, the new beneficiaries. *Greenleaf v. Queen*, 1 Peters (U. S.) 138, 148; *Stout v. Belts*, 26 N. Y. S. 809; *Dumas, Trustee v. Robins*, 48 Ala. 545; *McDougald's Administrator v. Carey*, 38 Ala. 320; *Mauniz v. Elder*, 1 Ohio Circuit Decisions 36. To hold otherwise would be to interfere with the operation of the trust and the substantial rights of third parties under it, while it is imposing no hardship to require those interested in the further prosecution of the action to substitute for the former trustee, the successor trustee and the new beneficiaries.

This is merely the general rule that, where one is a party to an action only in a representative capacity, termination of his capacity eliminates him from the action just as completely as though he had died. Further prosecution of the action against him in that capacity is futile and the proceeding should be dismissed as to him. *Taylor, et al. v. Savage*, 1 Howard 282, 285; *Hulburd v. Commissioner*, 296 U. S. 300, 314; *Adams v. Leland*, 7 Pick. (Mass.) 62; *People v. Harrigan*, 291 Ill. 206, 208, 125 N. E. 903; *New York & W. U. Teleg. Co. v. Jewett*, 115 N. Y. 166, 21 N. E. 1036; *Brown v. Melton* (Tex.), 13 S. W. 473.

In *Taylor, et al. v. Savage*, 1 Howard 282, 285, this court stated with reference to a former executor (p. 285):

“ \* \* \* Before the appeal was prayed on either side, he had ceased to be the representative of the estate of Samuel Savage, and had no control over it, nor any right to interfere with it by prosecuting or appearing to an appeal, or in any other manner. By his removal from the office of executor, he was as completely separated from the business of the estate as if he had been dead, and had no right to appear in or be a party in this or any other court, to a suit which the law confided to the representative of the deceased. No further proceedings, therefore, could be had on the decree in the District Court, until Benham, the administrator *de bonis non*, was made a party.”

In the brief of petitioner on writ of certiorari herein reference is made to Section 3467 of the Revised Statutes, amended by Section 518 of the Revenue Act of 1934, C. 277, 48 Stat. 680,760, and the statement is made that “the trust company could not avoid liability for the amount of the Government’s claim, or defeat its right to maintain this action, even if it could prevail upon the proper state court to permit distribution of the trust corpus.” Petitioner’s brief then cites several cases involving the personal liability of a bankruptcy trustee or trustee for creditors who have paid debts due general creditors before satisfying the tax

debt due to the Government. While it is submitted that Section 3467 of the Revised Statutes has no application to the facts surrounding the termination of this trust and the passing of the trust *res* by operation of law, that is nevertheless a problem not now confronting the court. The death of Henry Duggan terminated the trust and caused the transfer from one trustee to the other trustee and it was not necessary to obtain any order of distribution from a state court.

Continental National Bank and Trust Company of Chicago has been made a party to this proceeding in only two capacities, *i. e.* (1) as trustee of a fund of \$50,000 under item 3 of the last will of James Duggan, deceased, and (2) as trustees of the residuary estate of James Duggan, deceased, under item 6 of his will. This latter trust has terminated, the trustee capacity of Continental National Bank and Trust Company of Chicago with respect thereto has ceased, and this writ of certiorari should therefore be dismissed as to the Continental National Bank and Trust Company of Chicago, as trustee under item 6 of the last will and testament of James Duggan, deceased,

Respectfully submitted,

EDWARD H. McDERMOTT,

*Attorney in fact for Continental  
National Bank and Trust Com-  
pany of Chicago.*

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CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

**No. 22**

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY, TRUSTEE UNDER THE LAST WILL AND TESTA-  
MENT OF JAMES DUGGAN, DECEASED, ET AL.,

*Respondents.*

BRIEF FOR CONTINENTAL NATIONAL BANK AND TRUST COM-  
PANY OF CHICAGO, TRUSTEE UNDER WILL OF JAMES  
DUGGAN, DECEASED, FOR CHILDREN OF TIMOTHY DUGGAN.

HERBERT POPE,

*Counsel for Continental National  
Bank and Trust Company of  
Chicago, Solely as Trustee  
under Will of James Duggan,  
Deceased, for the children of  
Timothy Duggan.*



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BRIEF FOR CONTINENTAL NATIONAL BANK AND TRUST COM-  
PANY OF CHICAGO, TRUSTEE UNDER WILL OF JAMES  
DUGGAN, DECEASED, FOR CHILDREN OF TIMOTHY DUGGAN.

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## STATEMENT OF QUESTIONS RAISED.

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The bill in this case is a suit to collect a tax based on the trust fund theory. It seeks to establish the liability of the Johnston City & Big Muddy Coal & Mining Company for an income tax claimed to be due on account of an alleged sale at a profit of some of its property in 1920 and the liability of the defendants as transferees of the property of the corporation. The bill was filed in 1932 and defendants filed a motion to dismiss on the ground that the bill stated

no cause of action and that the statute of limitations barred the suit. Not until 1937, when the case was resurrected by the District Court, did this motion come up for disposition.

After a brief had been filed in support of the motion calling attention to the decision of this Court in *United States v. Updike*, 281 U. S. 489, and the fact that the suit had not been brought within six years after the making of an alleged assessment against the taxpayer, the Government asked leave to file an amendment, setting forth an alleged jeopardy assessment against James Duggan, deceased, some two years after he was known to have died, on the ground that "This amendment is necessary because the allegation that an assessment was made against James Duggan, deceased, was omitted from the original bill of complaint, and is an important fact in determining whether the present action was timely brought against these defendants." (R. 15.)

Before leave was granted by the District Court to file the amendment the Government confessed the motion to dismiss the original bill. (R. 13.) This was a confession that the original bill stated no cause of action and, if it did, that the suit was barred by the statute of limitations. A motion was then made to dismiss the amended bill and the District Court subsequently sustained this motion.

As to the jeopardy assessment, we believe it is clear that it does not avoid the bar of the statute of limitations as to the only cause of action which Government counsel assume was alleged in the original bill, even if such an assessment against a man who had been dead two years could possibly have any validity or effect for any purpose.

The assessment against the corporation was made in January, 1925 and the jeopardy assessment against James Duggan, deceased, was made on February 14, 1931. (R. 3, 15.) This was more than six years after the assessment

against the corporation and after any suit against any transferees of property of the corporation was barred under the decision of this Court in the *Updike* case. It is conceded that the proceeding before the Board of Tax Appeals involving James Duggan did not suspend the Government's right to bring a suit such as this is claimed to be against transferees of property of the corporation. (Brief, p. 36.) Section 280 suspended only the right to make an assessment against James Duggan. This suit was not commenced until 1932 and is, as we shall show, even as amended in 1937, necessarily outlawed on any possible view.

The public records of the Board of Tax Appeals disclose what may properly be called the joker in this case, and, in view of the long lapse of time that has occurred, it is only fair that this Court should be informed of the situation, so that it may understand why this case is here, or rather, why it should not be here.

In the statement of facts in the proceeding in the Board of Tax Appeals (18 B. T. A. 608) a trust agreement of December 31, 1919, is set forth which shows that the stock of the Johnston City & Big Muddy Coal & Mining Company, which formerly was held by four brothers and sisters in equal shares, was transferred to trustees under the provisions of the trust. It also shows a contract dated March 31, 1920, between the trustees and the purchaser of the mining property in question and an undertaking by the trustees to convey the property to the purchaser.

Then, if we look at another decision of the Board of Tax Appeals in an estate tax case entitled "*Appeal of James Duggan, Executor, Estate of Hanna Duggan*, 6 B. T. A. 1098," we see that one of the beneficiaries of the aforesaid trust, Hanna Duggan, died on May 18, 1923, that the trustees of the trust were then in posses-

sion of securities which represented the proceeds received by them on their sale of the property and that the trustees were recognized by the Revenue Bureau and the Board as the transferees in 1920 of the property of the corporation here in question.

o The transaction in 1920 involved a conveyance of real estate and it appears that the property in question was conveyed for the trustees through James Duggan to the purchaser. This is explained by the settled conveyancing practice in Illinois of never conveying the record title to real estate to trustees except by a record conveyance from an unmarried person. James Duggan answered that description and was not a trustee, but, instead of conveying to the trustees, the naked legal title was passed through him to the purchaser. He had the naked legal title only for an interval of time and could not, under the law of Illinois, be held entitled to be or to be in fact the real transferee of the property in question. If it had been known by the parties in 1920 that the rule of *Gray v. Darlington*, 15 Wall. 63, regarding the taxability of capital gains was to be overruled by this Court in the next year, very likely the parties would have been more cautious and would have used a stranger instead of James Duggan as the conduit through which to convey the real estate. Obviously, however, James Duggan had no more interest than such a stranger and served only as a conduit for the transfer of the legal title for the trustees who owned all the stock and made the contract to sell the property.

The irony in the situation is further disclosed by the fact that, under the terms of the trust, the trust property was to be distributed finally to the survivor of the four brothers and sisters, and James Duggan proved to be that one. On his death the administrator of his estate proceeded in due course to transfer the property in the estate to the parties

entitled under his will. The administrator could not, as a fiduciary, waive any rights he might have with respect to the Board proceeding. No attempt was made to bring him into the Board proceeding. The Board proceeding could relate only to property, if any, which had been transferred to James Duggan as the owner in 1920, and the administrator had not received any such property. The opinion of the Board member and the allegations of the bill in equity as to James Duggan's position in 1919 and 1920 (R. 3) are inconsistent with the records of the Board itself. Far from being the chief stockholder of the corporation, those records show that he was not a stockholder at all but had a one-fourth (and, as a result of the assignment of March 31, 1920, only a one-sixth) equitable interest in the stock (6 B. T. A. 1098, at pp. 1099, 1100).

If this Court will read the opinion of the Board member, Mr. Lansdon, it will realize why no fiduciary could voluntarily appear in the Board proceeding. Mr. Lansdon, unfortunately, was the one member of the Board who was not a lawyer, and the opinion discloses a determination in any event to make James Duggan a present of some property he did not have in order to sustain the Government's claim for a tax.

The Commissioner claimed a tax for some reason against Michael Duggan as well as James Duggan and both were parties to the Board proceeding. Michael Duggan died in 1928 and James Duggan died in March, 1929 before the case involving both decedents was submitted to the Board. This Board proceeding is referred to in the bill apparently for the purpose of supporting the contention that the jeopardy assessment against James Duggan, deceased, was made in time and therefore that the amended bill in 1937 was filed in time. As we shall show, however, the right to bring suits such as this was not suspended at all.

by the Board proceeding and this suit was barred before the jeopardy assessment was made or this suit commenced.

We also contend that the jeopardy assessment was invalid on its face, because it is against James Duggan, deceased, and there could be no jeopardy so far as any property belonging to James Duggan in this world is concerned. Further, we contend that if the time to make a jeopardy assessment can be extended by a Board proceeding even though the right to make such an assessment is not suspended, the suspension of the right to make any assessment would not continue beyond the death of James Duggan unless the administrator of his estate was properly made a party to the Board proceeding. The jeopardy assessment, therefore, was too late for any purpose.



## ARGUMENT.

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### I.

#### **The Order of the District Court Dismissing the Amended Bill of Complaint Is Sustained by the Confession of the Motion to Dismiss the Original Bill on the Ground That It Stated No Cause of Action.**

In the Court of Appeals and in the District Court Government counsel ignored the effect of their confession of the motion to dismiss the original bill in this case in spite of the insistence of counsel for the defendants that the confession disposed of the whole case. Now, in their brief in this Court, Government counsel state that this point has been abandoned. Of course there has been and can be no abandonment of the order entered by the District Court and of any fact or ground appearing in the record which supports the order entered by that court sustaining the motion to dismiss the amended bill and dismissing the bill.

This suit was evidently intended to be a suit in equity, based upon the trust fund theory, against alleged transferees of property of the Johnston City & Big Muddy Coal & Mining Company to collect a tax alleged to be due from that company. That is the contention made in the Government briefs. A motion was made to dismiss the bill upon two grounds, namely, that it failed to state a cause of action and that any supposed cause of action was barred by the statute of limitations. Five years after the suit was commenced, the plaintiff confessed this motion to dismiss the original bill. Thereafter the court granted plaintiff leave to file an amendment. The amendment was by its terms expressly limited to the question of the statute of limitations. A motion was then made to dismiss the bill as

amended and this motion was subsequently sustained and the bill dismissed.

Having confessed the motion to dismiss the original bill on the two grounds stated in the motion, and having made an amendment to the bill which related only to the statute of limitations, the confession of plaintiff that the bill stated no cause of action was not remedied or removed by the amendment. A bill filed in time might fail to state a cause of action. In that state of the record the District Court was not only justified in dismissing the amended bill, but it is difficult to see how it could do anything else.

In the brief filed in the District Court in support of the motion to dismiss the amended bill of complaint it was expressly contended that the amendment was wholly insufficient to rescue a pleading which was confessed to have stated no case. The order entered by the District Court must be considered at least to have sustained this contention and there is no ground now for reversing the order of the District Court. The Court of Appeals, in spite of the fact that this same contention was made in that court, chose to rest its affirmance of the order of the District Court on other grounds. However, the obstacle presented to the reversal of that order by reason of the confession of the motion to dismiss still remains.

Government counsel seem to have the idea that they need pay no attention to the record in the District Court. It is now suggested in the Government brief (p. 33) that if this case is still to be heard upon what is called the merits the decision of the Board of Tax Appeals may somehow be brought into the case as if a plea of *res judicata* had been alleged in the bill of complaint. Knowing that the allegations of the bill in regard to James Duggan are inconsistent with the records of the Revenue Bureau and the Board of Tax Appeals and cannot possibly be proved, the sugges-

tion now is that, notwithstanding the record in the District Court, the bill shall be changed again to present a new claim which admittedly is not presented by the bill as it now stands. Evidently even Government counsel are not yet sure that their bill states a good cause of action or, if it does, just what kind of a cause of action it may be. How the District Court, in view of the record now made in that court, can entertain this new suggestion, it is difficult to see.

Certainly a court of equity should not disregard the record before it in order to continue this litigation indefinitely. With interest accumulating at the rate of six per cent a year on a tax claim for the year 1920, it is obvious that there will be no property left for taxpayers by the time the Government has exhausted all the theories which it may still invent to sustain a tax in this case. In the meantime it has collected estate taxes on one theory and tried to collect income taxes on a wholly inconsistent theory. No wonder that Mr. Magill, on leaving the Treasury Department recently, suggested that one of the first things the Government should do is to provide some tax statutes which the Government at least can understand even if the taxpayer cannot. There is no equity in the Government's position when it seeks to take advantage of the uncertainty of its own statutes and the changing views of the courts to force payments from taxpayers when resistance means endless litigation with a yearly penalty of six per cent interest and the possibility that some court may adopt a new theory of law at the end of the period.

We will discuss the other questions raised by the Government brief on the assumption that the bill states a cause of action on the trust fund theory, but we insist, as we always have done, that the whole case was disposed of by the confession of the motion to dismiss the original bill.

We cannot change the record in the District Court even if we were so disposed. The order of the District Court should stand because no other order can be justified by the record.

## II.

**That This Suit Is in Any Event Barred Under the Provisions of the 1926 Revenue Act Is Settled by the Decision of the Supreme Court in *United States v. Updike*, 281 U. S. 489.**

Government counsel apparently are convinced that by repeatedly citing the decision of this court in *United States v. Updike*, 281 U. S. 489, without stating what that case actually decides, they will be able to make this Court believe that that decision supports the wholly different conclusion which is asserted but not really argued in their brief.

It is clear at any rate that no cause of action can be considered as stated at any time in this bill except a cause of action based on the trust fund theory to collect from a transferee a tax alleged to be due from the Johnston City & Big Muddy Coal & Mining Company. This cause of action, if properly alleged in the original bill, was necessarily barred by the statute of limitations contained in the 1926 Act, on which counsel rely, and the pleading of the jeopardy assessment against James Duggan, deceased, has not remedied this defect in any respect. Government counsel have advanced several different theories to support their contention. Their final effort in the brief filed in this Court does not escape the conclusion of this Court in the *Updike* case.

Section 280 of the Revenue Act of 1926 deals, amongst other things, with matters of procedure relating to the liability of transferees of property of a taxpayer. As gov-

ernment counsel state in their brief (p. 25) the Commissioner is given the right to proceed under Section 280 against any transferee, an initial transferee or a subsequent transferee, and finally to make an assessment of the established liability of any such transferee. A proceeding against one transferee, however, has no relation to a proceeding against another transferee, whether an initial transferee or a subsequent transferee. Such a proceeding against one transferee does not suspend the right to proceed against another transferee, and the liability which is established is the separate liability of each transferee against whom such a proceeding is commenced. The court so held in *Commissioner v. Krug*, 78 F. (2d) 57 (C. C. A. 9th Circuit). In that case the Commissioner proceeded under Section 280 first against one transferee of the taxpayer and, two years later, against another transferee of the taxpayer, claiming that the first proceeding suspended the running of the time for the second proceeding, but the court held that a proceeding against one transferee did not affect or suspend the right or the time to proceed against another transferee.

There is nothing in the statute to suggest, much less to provide, that the assessment thus made against one transferee has any relation to the time within which a suit in equity may be brought against another transferee, whether initial or subsequent, on account of his receipt of property of the original taxpayer.

The question of how the assessment obtained against one transferee under Section 280 shall be collected is a matter with which we are not really concerned in this case, but the suggestion of government counsel as to the time within which a suit in equity may be brought even against that transferee is clearly erroneous. (Brief, 23.) If the government elects to proceed against a transferee under Section 280 instead of by bill in equity in court on the trust

fund theory, it does not thereby extend the time within which such a bill in equity may be brought subsequently against that transferee. If an assessment, as the result of the proceeding under Section 280, is finally made, that assessment does not give the government an additional six years from the date of that assessment within which to bring a suit in equity on the trust fund theory to collect the tax from that same transferee. The right to bring such a suit was never suspended and it would be barred if commenced more than six years after an assessment against the original taxpayer. Of course there would be no sense in bringing such a suit, but, in view of the argument of Government counsel on pages 22 and 23 of their brief, it is important to point out that the period within which such a suit must be brought would still be six years from the time of assessment against the original taxpayer and not six years after the assessment against the transferee in the proceeding under Section 280.

Section 280 was intended to give the government an election either to adopt a course against a transferee which might lead to a Board proceeding or bring a suit in equity on the trust fund theory. There was no reason for suspending the right to sue in equity if the government elected to proceed under Section 280. Nor was there any reason for extending the time within which such a suit might be brought either against the same transferee or a transferee of that transferee. Only the right to make an assessment was suspended during the Board proceeding, and it was expected that an assessment would be secured which could be enforced against someone by distraint or a lien. It was not expected that after assessment the Government would wish to resort to the remedy in equity which it had already decided not to pursue, and therefore the statute did not offer the Board proceeding with the right also to bring a



suit in equity during another period of six years after an assessment was secured under Section 280.

The language in Section 280 on which government counsel rely, that the liability of the transferee shall be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in tax," does not confer a greater right or provide a different period of limitation for bringing equity suits like this one than is provided in Section 278(d). It does not provide that a right to sue shall continue even if the time for exercising such right has been allowed to expire. It follows necessarily that when a suit in equity is brought against any transferee of property of the original taxpayer the suit must be brought within six years after the assessment, if any, against the taxpayer. The time for bringing such a suit is not extended by reason of a subsequent assessment against a prior or other transferee as the result of a proceeding under Section 280.

In this case the jeopardy assessment against James Duggan, deceased, was not made until suits in equity such as this were barred by the applicable statute of limitations. The assessment against the corporation was made in January, 1925, and the jeopardy assessment against James Duggan, deceased, was made February 14, 1931. Section 280 contained no provision suspending a suit like the present one against transferees, and no effect, therefore, could be given to the assessment against James Duggan, deceased, which would result in reviving a cause of action already barred. The language in Section 280(a) cannot be construed in a way which might make the provision invalid.

This is all explained in the decision of this court in the *Updike* case. This court there states that the effect of the language in Section 280 above referred to "is to read into

that section, and to make applicable to the transferee equally with the original taxpayer, the provision of § 278 (d) in relation to the period of limitation for the collection of a tax. \* \* \* It follows that if by § 278 (d) the period of limitation had run in favor of the corporation (the original taxpayer), it had run in favor of the transferees."

When the Circuit Court of Appeals in its opinion said "We think it was not intended that the six-year provision of Section 278 should be read into it," that is, into Section 280, it meant obviously that an additional six-year period after an assessment against a transferee under Section 280 was not provided for by the language in Section 280 above referred to. Section 278(d) could not provide such a six-year period by being read into Section 280, and the Circuit Court of Appeals did not intend to disagree with the conclusion of this Court in the *Updike* case.

Section 278(d), if it is to be read into Section 280, must be taken as it stands. It says nothing about assessments against transferees, and Section 280 says nothing about suspending or extending the time within which suits may be brought against transferees. If a distinction was to be made between transferees and transferees of transferees a new statutory provision, as in the 1928 Act, was required.

Section 280 was supposed to provide a simpler and more direct method for assessing and collecting a tax from a transferee than was provided by a suit. If no appeal was taken to the Board from the sixty-day letter then assessment and distraint could follow at once. If an appeal was taken, then assessment and distraint would follow immediately upon the Board's finding of a tax if no court appeal was taken. Government counsel jump from the contention that the assessment against James Duggan, deceased, should be enforceable in some way to the conclusion that it can be enforced in a transferee suit such as this,

even though this suit in equity is brought more than six years after assessment against the original taxpayer, and they cite the *Updike* case to support this conclusion without any attempt to show how it does it.

Clearly, as we have shown, the *Updike* case disposes completely of the government contention. Any other conclusion would involve absurd results. It is admitted by government counsel that the Board proceeding involving James Duggan would not prevent an equity suit against the defendants in this case even while the Board proceeding was still pending. (Brief, 36.) Yet such a suit must have been dismissed if brought more than six years after assessment against the corporation, and necessarily there could not be another suit after the Board proceeding was ended against the same transferee on the theory that a suit once barred could be maintained under a different statutory provision. There cannot be two periods of limitation governing the same kind of suit against the same parties, so that a suit once held to be barred could be brought over again.

Government counsel agree with the Court of Appeals "that Congress did not intend to allow a six-year period of limitation for the collection of each successive transfer of the liability of the original tax" (Brief, 23), but the explanation offered, unless it defeats the main contention of counsel in this case, does not explain. If, after assessment in a proceeding under Section 280, there is another six years in which to bring a suit in equity against a transferee to collect a tax, then, within one year after the period for making such assessment under Section 280, there should be the opportunity to send a sixty- or ninety-day letter to that transferee's transferee and get another assessment against him and so on indefinitely. And after each assessment there should be another six-year period for collection

of the tax by a suit in equity, if the language in Section 280(a) means what counsel say it means. Each assessment against a transferee in a proceeding under Section 280 would be the equivalent of an assessment against the original taxpayer, and this game could be continued for any length of time. That is what the government contention comes to if it has any meaning.

Obviously this theory cannot be sustained. An assessment against a transferee in a Section 280 proceeding cannot be substituted for an assessment against the original taxpayer. Section 278(d) cannot be made over to fit that theory. The right to bring a suit in equity to collect a tax from a taxpayer or a transferee still expires six years after the assessment against the original taxpayer. After that time no assessment against a transferee can put life into an equity suit that is already barred. The Court of Appeals' answer to this contention of counsel was that in that case the Revenue Act of 1928 should apply to the 1931 assessment.

It should also be pointed out that the provisions of the 1928 Act confirm our contention as to the meaning of the 1926 Act and the decision of this Court in the *Updike* case. The 1928 Act, by referring for the first time expressly to transferees of a transferee, was intended to broaden and extend the provisions of the 1926 Act. It is certainly significant, as the Court of Appeals shows; that this suit would be barred if the provisions of the 1928 Act are applied to the facts in the case. In that view there is no justification for giving a strained construction to the Act of 1926 in order to extend its limitation provisions far beyond anything provided in the 1928 Act. Even in the matter of the assessment of the liability of a transferee of a transferee the provision is that that must be made in any event within three years after the expiration of the period for assessment against the original taxpayer.

A proceeding under Section 280 is intended to result in an assessment that can be utilized. Even if it cannot be used to extend the time for bringing suits in equity to collect taxes from other transferees, it can be the basis for distraint or for a lien on property and a suit to enforce the lien. In this case the only reason for attempting to bring an equity suit that was barred against another transferee was that the assessment against a dead man could not be used for purposes of distraint or for securing a lien. Because it was of no use for such purpose the attempt was made to use it as the beginning of a new six-year period for starting another proceeding to collect the tax—an equity suit that was already barred. Government counsel are asking for a new construction of the statute just to help them out in this particular case. Why spend five years on a Board proceeding if the Government were coming out in the end only with a belated equity suit which might have been filed in time against a real transferee even if the Board proceeding involving James Duggan had never been started?

We have assumed for the purpose of the foregoing argument that the assessment against the dissolved corporation in 1925 was valid. Whether it is or not, the result is the same so far as this case is concerned. If it is invalid this suit was barred on May 16, 1926, under Section 277 (a) (3) of the Revenue Act of 1926 which allows five years after the filing of a return in which to commence a proceeding in court for the collection of the tax. We will refer to the question of dissolved corporations in connection with the later discussion of assessments against deceased persons.



## III.

**The So-Called Jeopardy Assessment Against James Duggan Two Years After His Death Could Have No Legal Effect so Far as Appellees Are Concerned, and, If It Be Assumed That It Might Have Any Legal Effect, Then in Any Event It Came Too Late.**

The first comment to be made about the Board of Tax Appeals proceeding and the jeopardy assessment against James Duggan, deceased, is that they did not accomplish the purpose intended by such a proceeding and by an assessment based upon a Board decision. The Board had no means of enforcing its own order or decision, and the decision which it made did not enable the Commissioner to make an assessment which could be used for purposes of distraint or for the enforcement of a lien upon any property. The whole object of a Board proceeding was completely nullified. Apparently the Board thought it was entitled to proceed without anyone but the Commissioner before it and make a determination of the tax and leave it to the Commissioner to decide whether anything could be done with its order.

It seems clear that if Michael Duggan and James Duggan had both died before sixty-day letters were addressed to them, the Commissioner could not have made valid assessments against them as deceased persons because they had not appealed to the Board of Tax Appeals within the allotted time. The appeals which they did take while living suspended the Commissioner's right to make some kind of an assessment at any rate. They both died before their cases were argued or submitted to the Board. James Duggan could not take an appeal to the Court of Appeals from the decision made against him after his death any more than he could have appealed to the Board if



he had died before the time for that appeal. In both instances the purpose of the proceeding was to secure an assessment against a person who was alive, not against a person who was dead. It may be that some courts hold in some cases that a suit in court may continue after a party has died and a judgment may be entered *nunc pro tunc* as of the date of such party's death. No such procedure by the Board would accomplish the purpose for which it exists or accomplish the result which Government counsel desire, and it was not attempted in this case. What it did was of no effect and the Board proceeding must therefore be held to have abated at the date of James Duggan's death.

It may be that where a petitioner is before the Board the proceeding can be considered as pending even though the Board finally holds that for some reason it never had jurisdiction. It is an entirely different matter to hold that a Board proceeding may be continued indefinitely without any petitioner before it, and that ultimately a final order may be made against the deceased petitioner, who can take no appeal, and that after the time for taking an appeal has expired the Board proceeding will then, and only then, be considered as at an end. It is claimed that then a jeopardy assessment or some other kind of an assessment may be made against the decedent for the purpose of determining the time for starting a suit to collect a tax from someone else. There does not seem to be any other purpose which such an assessment could serve, and we believe that if it is not good for any other purpose it cannot be valid merely for the purpose of determining the time for starting a suit against someone else, even assuming that such a suit would otherwise be available. Obviously Government counsel are asking this Court to create some new law in order to cure their blunders in this particular case.

With reference to the power of the Commissioner to make a valid assessment against James Duggan, deceased, it

should be sufficient to refer to the decision of this court in *Hulburd v. Commissioner*, 296 U. S. 300. The Court there held that an assessment against a discharged executor would not be valid if, under the law of the state which discharged the executor, such discharged executor was legally dead. This Court therefore examined the law of Illinois to determine the effect of the discharge of an executor by a court in that state. Having concluded that under the law of Illinois a discharged executor was not legally an executor at all, this Court held that no assessment against such a discharged executor would be valid for any purpose.

We believe this Court will take judicial notice of the fact that a dead person is really dead under the law of all the states. It must follow, therefore, that in the view of this Court no valid assessment could be made against a dead person.

Counsel state that an assessment against a dead man must be valid because the reports of the Board of Tax Appeals and the courts are filled with cases in which the assessment was made after the death or dissolution of the taxpayer (Brief, p. 34). They do not stop to consider whether the question of validity was raised or actually involved in the decisions. In the *Updike* case, and in *United States v. Crook*, 18 F. (2d) 449, the validity of assessment against dissolved corporations was not questioned by the parties or discussed by the courts. The decisions in three cases in the Court of Claims (*Muir v. United States*, 3 F. Supp. 619, and the two *Anderson* cases, 15 F. Supp. 216 and 225) which counsel admit are the "few cases we have found" (Brief, p. 35) in which the validity of such assessments has been questioned, merely hold that a tax actually owing which was timely paid by a deceased taxpayer's executor is not recoverable by suit even if an assessment was never made or was invalid. The Court of Claims does say that when the Commissioner assesses a tax he does not

assess it against any person and accordingly an assessment against a dead man is valid, but this is not only *dicta* but is clearly contrary to fact. Assessments made without the names of persons owing the taxes would be futile and meaningless and the certificate which is signed by the Commissioner as quoted by the court (15 Fed. Supp. 216 at p. 225) shows that the actual taxpayers are designated. The *dicta* in these cases are of course inconsistent with the decision of this Court in the *Hulburt* case, *supra*. *Anderson v. Bass*, 88 F. (2d) 185, cited by counsel in this connection (Brief, p. 35), has no bearing at all on this point.

In a recent income tax case, *Standifer Construction Co. v. Commissioner*, 78 F. (2d) 285, the Circuit Court of Appeals for the Ninth Circuit held that every step in a proceeding by or against a dissolved corporation after the expiration of the period fixed by state law for proceedings by or against dissolved corporations is invalid and of no effect. This rule should apply just as much to an assessment as to any other action taken against a defunct corporation. It should also apply in the case of the death of a natural person, as this Court has indicated in a decision cited in the *Standifer* case, *Oklahoma Gas Co. v. Oklahoma*, 273 U. S. 257, in which this Court said (p. 259):

“There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation. It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. \* \* \* It follows therefore that, as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant.”

If no assessment against a dead person would be valid, then of course the jeopardy assessment in this case is

invalid: But there is an additional infirmity in this jeopardy assessment against James Duggan, deceased. This jeopardy assessment was made during a period when, according to Government counsel, an ordinary assessment could not be made. Clearly the suspension of the right to make an assessment would be meaningless if, during such suspension period, the Commissioner could at will make such an assessment anyway merely by calling it a jeopardy assessment. It must be true at least that if the so-called jeopardy assessment shows on its face that there is no jeopardy, then such an assessment cannot be held valid if made during the period of suspension.

Clearly a jeopardy assessment against a dead person carries on its face a denial of jeopardy. Jeopardy died with the death of James Duggan. There may have been jeopardy before he died, but that jeopardy ceased with his death and there was no property in this world which was formerly his which could be reached by a jeopardy assessment against him. In fact there was not so much jeopardy with reference to the property in his estate as there was in the case of the same property while James Duggan lived. It is submitted, therefore, that there is no ground on which the jeopardy assessment in this case can be recognized as valid.

It is conceded that if the Board proceeding necessarily abated with the death of James Duggan then even the jeopardy assessment was not in time to sustain the Government's contention. Or if the decision or order of the Board is to be treated as if made as of the date of the death of James Duggan, then also the jeopardy assessment, even if valid, would be too late. It cannot be true that such a Board proceeding could be continued indefinitely after the death of the petitioner, with interest continuing to accumulate on the tax claim, and then an order be finally entered and an assessment made which could be the basis

of a suit within the next six years against any one who might become a transferee of the decedent's property.

It is respectfully submitted that there are three separate and distinct grounds which require an affirmance of the decisions of the Court of Appeals and the District Court.

HERBERT POPE,

*Counsel for Continental National Bank  
and Trust Company of Chicago,  
solely as Trustee under Will of James  
Duggan, deceased, for the children of  
Timothy Duggan.*

October 8, 1938.





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FILED

OCT 8 1938

CHARLES ELMORE ORSLEY  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

No. 22

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST  
WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

*-On Writ of Certiorari to the Circuit Court of Appeals  
for the Seventh Circuit.*

**ANSWER TO PETITIONER'S MOTION FOR SUBSTITUTION.**

CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY OF CHICAGO,

By EDWARD H. McDERMOTT,

*Its Attorney-in-Fact.*



IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

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UNITED STATES OF AMERICA,

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CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST  
WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

---

*On Writ of Certiorari to the Circuit Court of Appeals  
for the Seventh Circuit.*

---

ANSWER TO PETITIONER'S MOTION FOR  
SUBSTITUTION.

---

Comes now Continental National Bank and Trust Company of Chicago, a national banking association, with its principal office at Chicago, Illinois, appearing specially and not generally, and prays that the Motion for Substitution filed by petitioner herein to substitute the "Continental National Bank and Trust Company of Chicago, Illinois, executor under the last will and testament of Henry Dug-

gan, deceased" as a party defendant be denied for the following reason:

The corporation sought to be substituted is not and never has been the executor under the Last Will and Testament of Henry Duggan, deceased.

CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY OF CHICAGO,

By EDWARD H. McDERMOTT,

*Its Attorney-in-Fact*

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

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UNITED STATES OF AMERICA,

*Petitioner,**vs.*CONTINENTAL NATIONAL BANK AND TRUST  
COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST  
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---

*On Writ of Certiorari to the Circuit Court of Appeals  
for the Seventh Circuit.*

---

AFFIDAVIT IN SUPPORT OF ANSWER TO PETI-  
TIONER'S MOTION FOR SUBSTITUTION.STATE OF ILLINOIS, }  
COUNTY OF COOK. } ss.

B. E. BRONSTON, Being first duly sworn, represents:

1. That he is Assistant Secretary of Continental Na-  
tional Bank and Trust Company of Chicago, a national  
banking association.

2. On October 3, 1938, said corporation received and acknowledged service of the aforesaid motion for its substitution in this proceeding as the executor of Henry Duggan, deceased, in which motion it is described as "Continental National Bank and Trust Company, Chicago, Illinois."

3. Said corporation is a party to this proceeding in its capacity as Trustee under item 3 of the Will of James Duggan, deceased, for the benefit of the late Timothy Duggan and certain other beneficiaries.

4. Said corporation is not and never has been the executor under the Last Will and Testament of Henry Duggan, deceased, or a Trustee under said will or the administrator of his estate. Its substitution as a party defendant in this proceeding in place of the said Henry Duggan, deceased, would be erroneous.

B. E. BRONSTON.

SUBSCRIBED and SWORN to before me this 6th day of October, 1938.

WILLIAM P. BEST,  
Notary Public.

My commission expires May 24, 1941.



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FILED

OCT 22 1938

CHARLES ELMORE CROPLE  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

                      
**No. 22**  
                    

UNITED STATES OF AMERICA,  
*Petitioner,*  
*vs.*

CONTINENTAL NATIONAL BANK AND TRUST COM-  
PANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND  
TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

                      
ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT.  
                    

**ANSWER TO PETITIONER'S MOTION TO JOIN NEW  
PARTY DEFENDANT.**



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938.

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No. 22

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UNITED STATES OF AMERICA,  
*Petitioner,*

*vs.*

CONTINENTAL NATIONAL BANK AND TRUST COM-  
PANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL  
AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

---

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT.

---

ANSWER TO PETITIONER'S MOTION TO JOIN NEW  
PARTY DEFENDANT.

---

Comes now Continental Illinois National Bank and Trust  
Company of Chicago, a national banking association with  
its principal offices at Chicago, Illinois, appearing spe-  
cially and not generally, and prays that the "Motion to  
Join New Party Defendant" filed by petitioner herein  
seeking to join as a party defendant in this proceeding  
the "Continental Illinois National Bank & Trust Com-  
pany of Chicago, a national banking corporation with offi-

ces at Chicago, Illinois, as trustee under the power of appointment exercised by Henry Duggan, deceased, by his last will and testament, over property previously held in trust by Continental National Bank & Trust Company of Chicago in trust under the will of James Duggan, deceased," and to continue this action against the Continental Illinois National Bank and Trust Company of Chicago in such capacity, be denied for the following reasons:

There is no procedure by which a new transferee proceeding may be instituted against this bank in an appellate court.

If there were a right to bring this bank into this proceeding at any time it should have been done in a lower court, and, in any event, the time has passed for joining it as a party in this court.

A transferee proceeding in equity cannot be maintained against this bank as trustee under a trust created by the will of Henry Duggan without also joining the beneficiaries of such trust.

CONTINENTAL ILLINOIS NATIONAL BANK,

AND TRUST COMPANY OF CHICAGO,

By CARL MEYER,

*Its Attorney-in-Fact.*

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

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No. 22

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UNITED STATES OF AMERICA,

*Petitioner,*

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, A CORPORATION, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JAMES DUGGAN, DECEASED, ET AL.

---

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT.

---

BRIEF IN SUPPORT OF ANSWER TO PETITIONER'S MOTION TO JOIN NEW PARTY DEFENDANT.

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1. This bank is a trustee of a trust created by the will of Henry Duggan, deceased, for the benefit of certain beneficiaries whose rights and interests in the trust property arose immediately upon the death of Henry Duggan. Those interests did not await the physical delivery or transfer of the property in question from the Continental National Bank and Trust Company of Chicago (hereafter called "Continental National") to this bank as such trustee. They arose at once by operation of law upon the death of Henry

Duggan. The Continental National, upon such death, ceased to be a trustee under the will of James Duggan, and became merely the custodian of the property in question for this bank as trustee and for the beneficiaries under the new trust created by the will of Henry Duggan. The rights and interests of such beneficiaries cannot be determined in any proceeding in which they are not parties, and there is no method by which this bank as trustee or the beneficiaries under this trust can properly be made parties to any pending proceeding in this court.

The case of *Greenleaf v. Queen*, 1 Pet. 138, 148, referred to in the Government's motion, makes it clear that the Government's claim to collect a tax from this trustee and the beneficiaries under the Henry Duggan trust could be maintained only by a new proceeding, by supplemental bill or otherwise, in the District Court. There is no process of substitution in an appellate proceeding which can remedy a defect of this kind. Certainly a new tax case against new transferees cannot be instituted in an appellate court by means of a substitution of parties after the statutory time for the commencement of such a proceeding has expired.

While there are various federal statutes providing for the substitution of parties (see 28 U. S. C. A., secs. 778, 779 and 780) there is no statute that covers the case of the termination by operation of law of one trust and the creation of an entirely new trust with a different trustee and different beneficiaries, nor is the situation similar to the mere transfer of an interest *pendente lite*. The Continental National, through no action of its own, has ceased to be a trustee and the trust under which it operated has terminated. The new trustee is not a successor but is trustee of an entirely new trust. Yet it had a right to all of the property from the moment of Henry Duggan's death and it alone can account for the property.

Under these circumstances a new action or a supplemental



bill in the nature of a new transferee proceeding in the trial court (if the action were pending there) would be the only methods of procedure open to the Government and it would be improper now to join the Continental Illinois National Bank and Trust Company of Chicago (hereafter called "Continental Illinois"), as trustee under the will of Henry Duggan, as a party defendant and to continue this writ of certiorari against it. *Cf. Chester v. Life Ass'n. of America*, 4 Fed. 487.

2. Henry Duggan died on October 16, 1937. The right of this bank to become trustee under his will and to receive the trust property arose at that time, and the physical transfer or conveyance of the property from the Continental National was not necessary to the creation of the trust. The time of such transfer was immaterial. That bank, as already stated, had ceased to be a trustee under the will of James Duggan and, after Henry Duggan's death, held the property as custodian for this bank as trustee and for the beneficiaries under the new trust created by the will of Henry Duggan. That this trust was created by the exercise of a power of appointment is immaterial and does not alter the fact that on Henry Duggan's death a new trust came into existence with new beneficiaries and a new trustee.

In many states testamentary trustees are required by statutes to file periodical and final accounts (see Bogert, *Trusts and Trustees*, Vol. 4, sec. 965, *et seq.*). This is not true in Illinois. In Illinois the Probate Court has no jurisdiction over trusts and there is no statute or court rule relating to accounting by trustees (see Bogert, *Trusts and Trustees*, Vol. 4, sec. 965). In the case of *Warner v. Mettler*, 260 Ill. 416, 103 N. E. 259, an account filed by a testamentary trustee was ordered stricken from the files of the lower court on the ground that there was no jurisdiction in equity to pass upon and approve the report of a testa-

mentary trustee, since "the report presented no reason a court of equity to assume jurisdiction in this matter."

The trustee capacity of Continental National there automatically ceased, by the terms of the will of James Duggan, which created the trust, on October 16, 1937, the trustee capacity of Continental Illinois, as trustee under the will of Henry Duggan, began at the same time. Under the will of James Duggan it was the duty of the trustee of the expired trust to turn over the property therein to the trustee of the new trust as soon as possible after Henry Duggan's death, and the laws of Illinois do not provide for the filing of a final account or for any court proceeding or order in connection therewith.

At that time this proceeding was pending in the Circuit Court of Appeals for the Seventh Circuit. While the matter was still there counsel for the Government were advised of the death of Henry Duggan (see affidavit in support of motion to dismiss certiorari, page 5). Counsel must then have known of the termination of the trust under which Continental National was trustee, as the will of James Duggan provided that it should terminate upon the death of Henry Duggan. The record does not disclose whether or not counsel knew of the creation of the new trust, but, if not, it would have been a simple matter to inquire as to the disposition made of the trust property of Henry Duggan, or to examine his will on file in the Probate Court of Cook County, Illinois.

However, it was not until after the issuance of the mandate from the Circuit Court of Appeals that any action was taken, and then application to bring in a new party was not made to the District Court (which had jurisdiction at that time) but to the Circuit Court of Appeals which had lost jurisdiction, and application was made only to substitute the executor of Henry Duggan (although the party named as executor in the application was not

ecutor) and not to bring in this bank as trustee under the will of Henry Duggan.

By reason of the Government's laches it is now too late to make the substitutions or additions which the Government desires even if they could be made in a court of review. In those situations, where a suit may be revived against a successor in interest it has uniformly been the ruling of this court and the lower federal courts that the substitution must be made in the court having jurisdiction at the time of the transfer of the interest. In *Taylor, et al. v. Savage*, 1 How. 282, an appeal was held irregular because an administrator had not been substituted below. In *McClane v. Boon*, 6 Wall. 244, it was held that "application should have been made to the court below for the purpose of reviving the suit in the name of the widow and heirs of the deceased; and then a writ of error could have regularly issued."

This court in the case of *Florida v. Croom*, 226 U. S. 309, dismissed a writ of error because of the failure of the plaintiff in error to substitute a successor state official before suing out the writ of error. In *Davis v. Preston*, 280 U. S. 406, it was held that a writ of certiorari "was improvidently allowed and must be dismissed" due to the failure to substitute a successor federal officer in the court to which the writ was directed. See also *Barribeau, et al. v. Brant*, 17 How. 43, and *Sharon v. Terry*, 36 Fed. 337, 364.

Not only did the Government fail to make the necessary substitution below in the present case but it has also delayed too long to make the substitution in this court even if this court had jurisdiction over that matter. Rule 19 of this court pertaining to the substitution of the representative of a deceased person (which is one of the few situations where there may be a substitution in an appellate court) requires that the substitution be made by the second day of the term next succeeding the suggestion of

death. That day was October 4, 1938, but no application was made to bring the Continental Illinois into this case in any capacity until after that date. Indeed, this bill has not, up to the present time, been served with any notice of any application to bring it into this case as executor under the will of Henry Duggan. As this court stated in *Dolan v. Jennings*, 139 U. S. 385, 387, "the proper course of proceeding upon this subject has been wholly disregarded."

Counsel for the Government refer to Rule 25 (c) of the Federal Rules of Civil Procedure which relates to substitution of parties and continuance of an action against an original party where there has been a transfer of interest. Rule 1 limits the application of the Federal Rules of Civil Procedure to proceedings "in the District courts of the United States" and there can be no question but that Rule 25 (c) has no effect upon appellate procedure. See Moore's Federal Practice under the new Federal Rules, Vol. 2, p. 2426. It is also doubtful that Rule 25 (c) was intended to cover the situation presented here even if it had occurred in the District Court as there is not a transfer of interest but the termination by operation of law of one interest and the creation of others, and any right of the Government may have against Continental Illinois under the will of Henry Duggan is a new cause of action which should be prosecuted through a new transferee proceeding.

3. It is the special duty of a court of equity to protect the beneficiaries of a trust. No court of equity is authorized to ignore their existence or their rights. The Government recognized this when it filed the original bill in this case. It made the beneficiaries of the trusts under James Duggan's will defendants in the cause. Since then, a long time before this court was asked to intervene, a new trust with new beneficiaries came into existence. We submit that this is not the proper tribunal in which to bring a new

supplemental proceeding against the trustee in that trust, and that, in any event, the beneficiaries of that trust are necessary parties to any proceeding that may be instituted in any court.

The Illinois rule as to this is stated in *Peoples Bank and Trust Co. v. Gregory*, 347 Ill. 397, 179 N. E. 856, as follows (p. 398):

“ \* \* \* The general rule is that in all suits respecting trust property, whether brought by or against a trustee, the beneficiaries are necessary parties, and the objection on account of their not being made parties may be taken on appeal. The trustee is a necessary party because he holds the legal title. The beneficiary is a necessary party because he has the equitable and ultimate interest to be affected by the decree. (*Ambos v. Glos*, 314 Ill. 438; *Rodman v. Quick*, 211 id. 546; *Wilson v. Central Trust Co.*, 285 id. 427; *Dubs v. Egli*, 167 id. 514.) ”

See also *Carey, et al. v. Brown*, 92 U. S. 171, 172, and *Perry on Trusts*, secs. 873 and 874.

As to this requirement, we are not dealing with matters of procedure which may be governed by rules of court or rules of procedure. We are dealing with substantive rights and the time within which, under the revenue acts, such rights may be brought in question.

Since no application has been made to bring into this proceeding the beneficiaries of the trust created by the will of Henry Duggan, deceased, and for the other reasons presented in the answer of this bank and in this brief, it is submitted that the motion for the addition of this trustee as a party defendant should be denied.

Respectfully submitted,

CONTINENTAL ILLINOIS NATIONAL BANK  
AND TRUST COMPANY OF CHICAGO,

By CARL MEYER,

Its Attorney-in-Fact.

October 22, 1938.





# SUPREME COURT OF THE UNITED STATES.

No. 22.—OCTOBER TERM, 1938.

<p>United States, Petitioner,  <i>vs.</i>          Continental National Bank and Trust          Company, Trustee under the last          will and testament of James Duggan,          Deceased, et al.</p>	}	<p>On Writ of Certiorari to          the United States Cir-          cuit Court of Appeals          for the Seventh Circuit.</p>
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[January 3, 1939.]

Mr. Justice BUTLER delivered the opinion of the Court.

May 6, 1932, petitioner sued respondents in the federal court for the northern district of Illinois to enforce a claim for part of income and profits taxes for 1920 assessed against an Illinois corporation dissolved in December, 1921. The question for decision is whether the suit is barred by lapse of time.

The pertinent substance of the complaint, as amended February 14, 1937, follows:

In 1919 and 1920, James Duggan, hereafter called the testator, was the principal stockholder of the Johnson City & Big Muddy Coal & Mining Company, which owned a subsidiary corporation. May 16, 1921, these corporations made consolidated income and profits tax returns for 1920, showing a tax of \$5,269.21, which was paid. During 1920 and 1921 the mining company was being dissolved; it converted its assets into cash and securities and transferred \$295,331.64 to testator; he appropriated it to his own use. Having determined deficiency of \$316,620.61 against the company, the commissioner of internal revenue December 6, 1924 sent notice to it by 60-day letter. The taxpayer having failed to petition the board of tax appeals for redetermination, assessment was made against it for that amount.

April 15, 1926, the commissioner notified testator that there was proposed for assessment against him the amount of \$295,331.64, constituting his liability, as transferee of taxpayer's assets, on account of the unpaid balance of its 1920 taxes. June 11, 1926, testator

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filed with the board of tax appeals his petition for redetermination. In March, 1929, he died. January 27, 1931, the board made an order of redetermination in the amount proposed by the commissioner, with interest from December 6, 1924. The order was not reviewed. February 14, 1931, the commissioner made a jeopardy assessment against the deceased in the amount fixed by the board as his liability as transferee.

His will was admitted to probate; a trust company it named was appointed executor; and, the executor having been dismissed, one Robinson was, on September 15, 1930, appointed administrator. Before settlement of the estate, plaintiff, April 24, 1931, filed its claim with the administrator. But he paid nothing on account of it and, making distribution in accordance with the will, transferred to defendant Henry Duggan \$50,000 and to defendant trustee the rest of the estate, about \$1,500,000. Plaintiff alleged that the assets so distributed had become impressed with a trust for the payment of its claim against testator and prayed decree enforcing it against trustee and beneficiaries under the will to the extent of assets transferred by the taxpayer to testator with interest.

Defendants, June 6, 1933, moved to dismiss the complaint on the ground that the suit was barred by §§ 277, 278, 280, Revenue Act, 1926, as amended, and § 311(b), Revenue Act, 1928. Plaintiff, January 11, 1937, confessed defendants' motion to dismiss. Then, applying for leave to amend the complaint, it represented to the court that amendment was necessary because the allegation that an assessment was made against testator was omitted from the original bill and was an important fact in determining whether the present action was timely brought. Leave having been granted, it immediately amended by adding the allegation that, February 14, 1931, the commissioner made against testator the jeopardy assessment above referred to. The complaint was not otherwise changed. March 22, 1937, the court sustained defendants' motion and entered decree dismissing the amended bill of complaint. The circuit court of appeals affirmed. 94 F. 2d 81. This Court granted a writ of certiorari. 304 U. S. 554.

The question is whether the suit is barred by the statutory provisions on which the motion to dismiss was based. First to be considered are §§ 277, 278 and 280, read in connection with applicable provisions of §§ 274 and 279 of the Revenue Act of 1926.<sup>1</sup>

<sup>1</sup> 44 Stat. 55 et seq.

The pertinent substance of these follows:

Within 60 days after notice of the commissioner's determination of deficiency, the taxpayer may file petition with the board of tax appeals for redetermination; no assessment or proceeding in court for collection shall be made or begun until the board's decision has become final. § 274(a).<sup>2</sup> The amount redetermined by decision that has become final shall be assessed and upon his demand shall be paid to the collector. § 274(b).

Assessment shall be made within five years after the return; "no proceedings in court without assessment for the collection of taxes shall be begun after the expiration of that period." § 277(a). The running of the statute of limitations on assessment or proceeding in court for collection of deficiency shall be suspended for the period during which the commissioner is prohibited from making assessment or bringing suit and for 60 days thereafter. § 277(b). Where the assessment has been made within the period properly applicable thereto, the tax may be collected by distraint or proceeding in court "but only if begun . . . within six years after assessment of the tax." § 278(d). If the commissioner believes that assessment or collection of deficiency will be jeopardized by delay he shall immediately assess the deficiency and "notice and demand shall be made by the collector for the payment thereof." § 279(a). Jeopardy assessment may be made whether or not the taxpayer has filed petition with the board. § 279(c). If it is made after the board's decision it may be only for the deficiency determined by the decision. § 279(d). The taxpayer may obtain stay of collection of the jeopardy assessment. § 279(f)-(h).

The liability at law or in equity of "a transferee of property of a taxpayer in respect of the tax" shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in case of a deficiency in a tax. § 280(a). Transferee liability must be assessed within one year from expiration of the period of limitation for assessment against the taxpayer. § 280(b)(1). The running of the period of limitation on transferee liability shall, after notice to transferee under § 274(a), be suspended for the period during which the commissioner is prohibited from making assessment of that liability and for 60 days thereafter. § 280(d).

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<sup>2</sup> The board's decision becomes final upon expiration of the time (six months after it renders decision) allowed for filing petition for review by a circuit court of appeals or the court of appeals of the District of Columbia. §§ 1001, 1005.

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This is not a suit upon assessment of deficiency against the taxpayer on account of the commissioner's determination as shown in his letter of December 6, 1924. The time for such a suit, six years after assessment, expired long before the commencement of this suit. § 278(d). *United States v. Updike*, 281 U. S. 489, 494.

Nor is it a suit authorized to be brought, in absence of assessment, to enforce liability of a transferee of the taxpayer's property. The time for bringing such a suit is six years, made up of five years after return allowed for assessment against taxpayer § 277(a), and one year thereafter for assessment against transferee. § 280(b)(1). The taxpayer having made its return on May 16, 1921, the six years expired May 16, 1927.

This suit is against transferees under the will of a transferee of the property of the taxpayer; it is based on the jeopardy assessment made against testator.

Plaintiff asserts that it had six years after that assessment, or until February 14, 1937, within which to bring this suit. Its reasoning is that § 280, specifying no period of limitation for collection of liability of a transferee after it has been assessed, and providing that it shall be collected subject to the same limitations as in the case of deficiency in a tax, makes applicable the period of limitation upon collection defined in § 278(d).

But no assessment was made against any of the defendants. None of them is a transferee of the property of the taxpayer; all are testamentary transferees of the estate of testator. It is clear that §§ 278(d) and 280 upon which plaintiff relies are not broad enough to impose on defendants any liability on account of the assessment against the testator.<sup>3</sup> And, as already shown, suit on assessment

<sup>3</sup> Cf. § 311, Revenue Act of 1928. It provides:

(a) "The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title. . . . (1) The liability, at law or in equity of a transferee of property of a taxpayer, in respect of the tax . . . imposed upon the taxpayer by this title.

(b) The period of limitation for assessment of any such liability of a transferee shall be as follows: (1) In the case of the liability of an initial transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the taxpayer. (2) In the case of the liability of a transferee of a transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the preceding transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;—except that if before the expiration of the period of limitations for the assessment of the liability of the transferee, a court proceeding for the collection of

against the taxpayer, or suit in absence of assessment of transferee liability, was by the applicable statutes of limitations barred long before this suit was brought.

Moreover, the assessment sued on was out of time. Plaintiff cites § 280(d) and seeks to apply to the facts of this case the rule that assessment against transferee is required to be made within 6 years after return, §§ 277(a), 280(b)(1), as follows: The taxpayer made its return May 16, 1921. When, on April 15, 1926, the commissioner notified testator that he proposed to assess transferee liability against him, there remained 13 months and a day of the period allowed for making that assessment; the commissioner was prohibited from making the proposed assessment for the 60-day period within which testator was permitted to petition for redetermination by the board and until its decision, January 27, 1931, became final, June 27, 1931, and for 60 days thereafter, September 25, 1931. §§ 278(d), 280(d). Taking in the 13 months and a day, plaintiff had until October 25, 1932 within which to assess testator.

But that calculation is defective for it fails to take into account any part of the period after appeal to the board that elapsed between the death of petitioner in March, 1929, and the assessment, more than 23 months later, February 14, 1931. Redetermination is granted to safeguard against erroneous exactions by the commissioner. Suspension of his authority to assess or collect is protection against compulsory payment pending final decision upon objections interposed by petitioner. The proceeding is an adversary one in which the party praying relief by redetermination is petitioner and the commissioner is respondent. The controversy is brought to issue by petition, answer, and reply that are by the

the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively,—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding.”

The report of the Senate Committee on Finance states: “Section 280 of the revenue act of 1926 does not specifically provide any limitation period in the case of a transferee of a transferee of the taxpayer. Section 311(b)(2) of the House bill provides, with specific exceptions, that the period for assessment in such case shall be one year after the expiration of the period of limitation for assessment against the preceding transferee. It seemed to the committee that this would unduly prolong litigation and that there should be a time when the transferee may know that he is no longer liable to be proceeded against. A committee amendment therefore provides that in all cases the tax must be assessed within three years after the expiration of the period of limitation for assessment against the taxpayer.” Senate Report No. 960, 70th Congress, 1st Session, p. 32.



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board required to be definite and certain. Rules 6, 14, 15.<sup>4</sup> Before its decision either party, for cause shown, may have the proceeding dismissed.<sup>5</sup> Rule 31. And in case of petitioner's death, the board may order substitution of proper parties. Rule 37.

No personal representative of testator nor any other person applied for substitution of a party to carry on the proceeding in the place of the deceased testator, and none was ordered. The commissioner failed to obtain or seek dismissal for lack of a necessary party or want of prosecution. Cf. *Rusk v. Commissioner* (CCA 7) 53 F. 2d 428, 430. Plaintiff does not contend that, no substitution having been applied for or made, the commissioner was not entitled to an order of dismissal. Nor does it suggest anything to support the assumption, made in its calculation of time and throughout its argument, that suspension of commissioner's authority to assess continued through the period of more than 23 months between testator's death and the assessment. There is no ground on which it may be held that Congress intended in case of death of petitioner, where no application for or order of substitution is made, indefinitely to continue suspension of the commissioner's authority to assess. Equally unreasonable would it be to hold that suspension of the commissioner's authority to assess the asserted transferee liability continued after testator's death for more than a reasonable time within which, no substitution having been applied for or made, to obtain dismissal. Unquestionably that time and more had expired long before the assessment was made.

As the suit is barred by provisions of the Revenue Act of 1926, we need not consider § 311(b) of the Revenue Act of 1928, upon which defendants also relied.

*Judgment affirmed.*

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<sup>4</sup> Revised to November 1, 1929. Rules 31 and 37 are numbered 21 and 23 in the present edition of the Rules.

<sup>5</sup> Section 906(c), Revenue Act of 1926, provides: "If a petition for redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board cannot determine such amount from the pleadings." 44 Stat. 107.



# SUPREME COURT OF THE UNITED STATES.

No. 22.—OCTOBER TERM, 1938.

United States, Petitioner,

vs.

Continental National Bank and Trust  
Company, Trustee under the last  
will and testament of James Duggan,  
Deceased, et al.

On Writ of Certiorari to  
the United States Cir-  
cuit Court of Appeals  
for the Seventh Circuit.

[January 3, 1939.]

Mr. Justice STONE.

I think the judgment should be reversed.

The first transferee was a "taxpayer" within the meaning of § 280(a)(1), since he was liable under the provisions of the revenue law to pay the tax and, like other taxpayers, was subject to assessment and distraint as well as to a suit for recovery of the tax. *United States v. Updike*, 281 U. S. 489, 494. Respondent, the second transferee, was therefore, in the words of § 280(a)(1), "a transferee of property of a taxpayer", and its tax liability was by that section to "be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in case of a deficiency in a tax imposed by this title . . . including the provisions . . . authorizing distraint and proceedings in court for collection . . ."

Under § 278(d) the statute of limitations for collection of the tax from the first transferee did not expire until January, 1931, six years after assessment of the tax against the original taxpayer and first transferor. *United States v. Updike*, *supra*. By § 277(b) the running of the six year statute is suspended, after the beginning of deficiency proceedings under § 274(a), "for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court". And by § 274(a) it is provided that during the pendency of deficiency proceedings "no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted . . ." It follows that the run-

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ning of the statute of limitations in favor of the first transferee was suspended during the pendency of the deficiency proceedings initiated with respect to him April 15, 1926, at least, as the opinion of the Court states, until the death of the first transferee in March, 1929, or for a period of nearly three years. The period of limitations for the collection of the tax from the first transferee was thus extended at least until 1933, within which time the present suit was brought against respondent. By virtue of the transfer, the transferee, to the extent of the property received, becomes subject to the tax liability of the transferor. *Phillips v. Commissioner*, 283 U. S. 589, 592, 593, and cases cited in footnote 1. Since the period of limitations and the provisions for its suspension under §§ 274(a) and 277(b), applicable to the first transferee and taxpayer, are by § 280(a) (1) likewise applicable to his transferee, who is also a taxpayer, *United States v. Updike*, *supra*, 494, it follows that the statute of limitations applicable to respondent, the second transferee, had not expired when the present suit was brought in May, 1932.

No distinction was made by the revenue laws between the liability and the period of limitations applicable to a first transferee and those applicable to a second until the enactment of § 311 of the Revenue Act of 1928, which provided in subsection (b) (2) that the liability of a second transferee of the property of the taxpayer should not extend beyond three years after the expiration of the period of limitation for assessment against the original taxpayer, except that provision was made for an extension of the time if within that period "a court proceeding for collection of the tax or liability" had been begun against the original taxpayer or the last preceding transferee. In recommending these changes the report of the Senate Finance Committee, No. 960, 70th Congress, 1st Sess., p. 32, prepared before our decision in the *Updike* case, pointed out that § 280 of the 1926 Act did not specifically provide any limitation period in the case of a transferee of a transferee, and it stated that the purpose of the new provisions in § 311(b)(2) was to shorten the period during which proceedings might be had against a second transferee. This legislative history is persuasive that under § 280 of the 1926 Act, as its language indicates, the second transferee is the transferee of a taxpayer and subject to the same period of limitations and provisions for its extension as is his transferor.

As a transferee is subject to the tax liability of his transferor, the second transferee under the 1926 Act is either subject to the same period of limitations as his transferor, or there is no statute of limitations applicable to him. But if the first transferee is a taxpayer, so as to avail himself of the benefit of the six year statute of limitations for collection of the tax, as held in the *Updike* case, his transferee is likewise a taxpayer, as well as the transferee of a taxpayer, so as to be subject to the burden of the provisions extending the period of limitation for collection of the tax. § 280(a)(1).

Mr. Justice BLACK concurs.

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